88-1315

FILED
FEB 7 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-

IN THE

Supreme Court Of The United States

October Term, 1988

KATHLEEN JOHNSON WU
Petitioner,

v.

THE BOARD OF TRUSTEES OF THE
UNIVERSITY OF ALABAMA,
a body corporate, et al.,
Respondents.

PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SUSAN WILLIAMS REEVES
Reeves and Still
714 South 29th Street
Birmingham, Alabama 35233
(205) 322-6631
Counsel for Petitioner

February 6, 1989

10 pp

QUESTIONS PRESENTED FOR REVIEW

1) Does rule that disparate impact evidence of sex discrimination cannot prove sex discrimination unless that disparate impact evidence is pled, impose a unique pleading standard on civil rights cases?

2) Are due process and equal protection guarantees of the Fourteenth Amendment violated by state university president's action unilaterally altering applicable promotion criteria thereby making faculty promotion more difficult by requiring an undefined, but higher standard, of scholarship publication which action has a disparate impact on female faculty?

PARTIES TO THE PROCEEDINGS BELOW

Plaintiffs	**Defendants**
Kathleen Johnson Wu	Board of Trustees of the University of Alabama, a body corporate
	Joab Thomas
	Douglas Jones

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDINGS BELOW	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	5
I. Disparate Impact Is A Method Of Proof Of Sex Discrimination Claims And Need Not Be Alleged Or Declared. If It Must Be Alleged, Then Disparate Impact Evidence Introduced At Trial Without Objection Automatically Amends The Complaint.	5
II. University President's Unilateral Alteration And Raising Of Criteria For Faculty Promotion, Which Actions Have A Disparate Impact On Female Faculty, Violate Due Process And Equal Protection Guarantees Of The Fourteenth Amendment.	8
CONCLUSION	11

TABLE OF AUTHORITIES

Cases: *Page*

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) 10

Bazemore v. Friday, 478 U.S. 385 (1986) 10

Baldwin County Welcome Center v. Brown, 466 U.S. 149 ..... 5, 6, 7

Board of Regents v. Roth, 408 U.S. 564 (1972) 10

Castaneda v. Partida, 430 U.S. 482 (1977) 9

Conley v. Gibson, 355 U.S. 41 (1957) 6

Connecticut v. Teal, 457 U.S. 446 (1982) 10

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 10, 11

Hoffman-LaRoche, Inc. v. Campbell, 512 So.2d 725, 733 (Ala. 1987) 8

Lassiter v. Covington, 861 F.2d 680 (11th Cir. 1988) 9

Menedez v. Perishable Distributors, Inc., 763 F.2d 1374 (11th Cir. 1985) 8

Smith v. Horner, 839 F.2d 1530 (11th Cir. 1988) 6, 7

Watson v. Fort Worth Bank and Trust Co., 101 L.Ed.2d 827 (1988) 10

Wu v. Thomas, 847 F.2d 1480 (11th Cir. 1988) 1

IN THE

Supreme Court Of The United States

OCTOBER TERM 1988

Kathleen Johnson Wu
Petitioner,

v.

The Board of Trustees of the University of Alabama, et al.
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner Kathleen Johnson Wu, respectfully prays that the Supreme Court grant a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered on November 10, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported as *Wu v. Thomas,* 847 F.2d 1480 (11th Cir. 1988) (A-4).[1]

JURISDICTION

The opinion of the Court of Appeals was filed on June 7, 1988 (A-4). The Court of Appeals denied the petition for rehearing in an order dated November 10, 1988 (A-3).

This Court has jurisdiction to consider this Petition pursuant to 28 U.S.C. §§ 1254(1) and 2101(c).

---

[1]The citations to the Appendix are designated by "A" followed by the page number.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved are the Fourteenth Amendment to the United States Constitution and the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(a) and 42 U.S.C. § 1983. They are set forth at pages one and two of the Appendix.

STATEMENT OF THE CASE

The district court found that the University of Alabama has a history of sex discrimination against faculty women and that the petitioner personally had been paid equalization money to alleviate the University's previous sex-based salary decisions (A-16). The University of Alabama had investigated its own employment practices affecting female faculty immediately prior to the petitioner's trial in the instant case and found that the salaries of women faculty were lower because historically women had been relegated to lower academic ranks on account of their sex (A-84).

The petitioner was an associate professor seeking promotion to the highest academic rank, professor. At the University of Alabama, there is one decisionmaker regarding promotions and that is the President. Various people and committees may recommend, but the President, in this case, Joab Thomas, decides who is and who is not promoted. President Thomas asserts that he does not rubberstamp promotion recommendations of others and considers these decisions a significant part of his job as President (A-85, 86). The district court found that to be true (A-25).

The faculty promotion process at the University of Alabama is and has been entirely subjective (A-25). The result of the subjective promotion process is that forty-two (42%) percent of all male faculty have been promoted to the highest rank of professor. Only fifteen (15%) percent of all female faculty are at the highest rank (A-84).

The University of Alabama is divided into seven academic divisions and twenty-eight other research centers or organi-

zations. The petitioner is employed in one of those academic divisions known as the College of Arts and Sciences (A-60 - 73).

Within the College of Arts and Sciences, 130 faculty are at the top rank of professor. Of that number at that rank, at 95.39 percent or 124 are male and six are female (A-92). In the College of Arts and Sciences, male faculty have been promoted to professor, on the average, 8.5 years after employment at the University. The six women promoted to professor waited an average of 14.6 years to receive promotions to the same rank. (A-92).

At trial the petitioner, through her counsel, argued to the Court that it allow the plaintiff to put on evidence of a pattern and practice of the defendant's conduct in denying promotions to women on the same basis as promotions were granted to men. The petitioner announced "that's one of the things we expect to prove here . . . " (A-90). The defendants responded that there would be no credible evidence that a pattern and practice of discrimination against women in promotion at the College of Arts and Sciences was under way at this time (A-91).

The disparate impact data showing female faculty compared to male faculty in rank, salary and length of promotion was introduced at trial without objection. Yet, the district judge found that the petitioner "had not introduced any evidence in support of a disparate impact theory of recovery" (A-57). The Court of Appeals found that the disparate impact evidence was in the record but that "the appellant did not argue the theory at trial and did not present a disparate impact claim to the district court" (A-10).

The appellate panel found that President Thomas decided in 1981, the year the petitioner first applied for promotion, "to raise the level of academic performance and scholarship with renewed emphasis in research . . . " (A-9). The Court of Appeals wrote "To accomplish this goal, it appears from the record that, whatever the criteria employed before 1981 (when Dr. Thomas became President of the University), the focus thereafter in considering promotions was the necessity for research productivity. The record further shows a higher

level of scrutiny to which promotions, pay raise, and sabbatical leave recommendations were received and acted upon the by (sic) upper levels of administration" (A-6). The Court found that the particular rank of full professor sought by the petitioner, was subject to heightened scrutiny compared to promotion at lower ranks and compared to tenure decisions (A-6). None of these new standards or changes were quantified or defined in any way. None of the new standards were contained in the University's faculty handbook which established the written criteria applicable to promotion to professor at the times the plaintiff applied (A-78 - 79).

Despite the University's issuing and having in force written standards for promotion to professor in the faculty handbook, the defendant Thomas knowingly unilaterally changed the standards the day he first arrived on campus in 1981 (A-88). Not until 1985, did the University itself adopt those increased standards in the faculty handbook (A-88). The defendants did not introduce any evidence or argue that the raised standards for faculty publication correlated in any fashion with the job performance of faculty employed in the rank of professor.

Although the district judge found that men promoted to professor prior to 1981 may not have published for years, he concluded that making this rank more difficult to achieve would promote more publication (A-29) and that Kathleen Wu failed to meet the President's new criteria now applicable to all seeking academic promotion since 1981. Neither the district nor appellate court commented on the arbitrary abandonment of the handbook criteria.

The Decision Below:

The Eleventh Circuit panel affirmed the denial of all relief to the plaintiff. The district court ruled that the plaintiff had introduced no evidence of disparate impact in the promotion of women to the rank of professor or salary. The panel found, that the district court's failure to "examine the evidence" under a disparate impact theory was not error because disparate impact was not alleged in the second

amended complaint not argued as a theory at trial (A-10). The panel relied heavily on findings that the scholarship standards had been raised by the President, but they did not address that evidence in the context of historical sex discrimination under a disparate impact analysis except to say that an excuse existed for ignoring that evidence.

REASONS FOR GRANTING THE WRIT

I. Disparate Impact Is A Method Of Proof Of Sex Discrimination Claims And Need Not Be Alleged Or Declared. If It Must Be Alleged, Then Disparate Impact Evidence Introduced At Trial Without Objection Automatically Amends The Complaint.

Employment discrimination cases should not have to meet a unique federal pleading standard so that trial evidence or theories of disparate impact must be alleged in addition to the allegation of the particular violation of employment discrimination laws. Evidence of sex discrimination is proven through different methods — one of which is disparate impact. Federal Rule of Civil Procedure 15(c) should be applicable to employment discrimination suits so that the pleadings alleging sex discrimination in violation of Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1983 are amended, if an amendment to allege the disparate impact method of proof is required, by such evidence introduced without objection.

This court has declared that civil rights plaintiffs do not stand in special shoes as litigants, and therefore, procedural requirements are not to be relaxed by courts in order to reduce barriers to presentation of their claims. *Baldwin County Welcome Center v. Brown,* 466 U.S. 149. Pleading the evidence has never been a requirement under Federal Rule of Civil Procedure 8 which states:

> **Rule 8. General Rules of Pleading**
>
> (a) Claims of Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim,

> cross-claim, or third-party claim, shall contain (1) a short and plain statement of the ground upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim need no new grounds of jurisdiction to support it, (2) *a short and plain statement of the claim showing that the pleader is entitled to relief,* and (3) a demand of judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded. (Emphasis supplied)

In *Baldwin*, this court rejected the notion of a double standard for evaluating pleadings because of "vague sympathy" for the plaintiff. *Id.* at 152. It should also reject any Court of Appeals' sympathy for defendants who face disparate impact data at a sex discrimination trial. Pre-trial discovery of the facts underlying disparate impact statistics prevents surprise to either party. Statistics that showed women are not promoted to the highest academic rank were not a secret to the defendants who, in this case, had done a self-study (A-80) which revealed that males were almost three times more likely to be selected as professor than women faculty (A-84).

The Court of Appeals, relying on *Smith v. Horner,* 839 F.2d 1530 (11th Cir. 1988), declared that the plaintiff had failed to allege or announce her intention of proving her sex discrimination allegations under a disparate impact analysis, so that the district court's "failure to examine the evidence in light of that theory is not clear error" (A-10). The district court, however, had found no disparate impact evidence had been submitted at all (A-57).

First, the method of proving an employment discrimination case is not required to be alleged under Fed. Rule of Civil Proc. 8. The federal rules generally require only notice of the violation to enable the defendant to form a responsive pleading. *Conley v. Gibson,* 355 U.S. 41 (1957).

Second, to impose such a common-law type pleading standard on plaintiffs in civil rights cases, for any reason, reeks of the "vague sympathy" for litigants deplored by this court in *Baldwin*. In this case, however, that sympathy was not directed to the plaintiff, but to the defendants, who must

be presumed to know their own employment patterns and in fact, found themselves that their own academic promotion practices were rooted in historical sex discrimination (A-80 - 84).

The Eleventh Circuit, despite the admonition of *Baldwin*, has converted a method of proof into a cause of action requiring plaintiffs to plead and/or announce their means of proving their case. The Eleventh Circuit in *Smith v. Horner* has reasoned that to allow proof of sex discrimination on a disparate impact theory not pled would cause a defendant to have to do more than merely articulate a legitimate reason for their action. In a disparate impact case, the defendant must actually produce evidence and bear a burden of proving a justification for its actions. *Id.* at 1536. The logical conclusion of this circuit's holding is that disparate impact evidence creates legal difficulties for employers, and that courts must shelter employer defendants from the burdens of justifying the employer's own employment practices.

The petitioner put the defendants on notice of her sex discrimination claims and that those claims arose because of her denial of promotion to the highest rank of professor. She announced that she intended to prove at trial a pattern or practice of discrimination in promotion decisions (A-92). The words "pattern or practice" mean the widespread application of a facially neutral process or rule. The promotion system allows various committees to escape responsibility for unlawful promotions because they decide nothing and allow the President to claim his actions are not taken with an intent to discriminate but are just implementation of committee recommendations (A-74 - 77).

That the plaintiff would prove her claims by developing and offering statistical evidence showing that women faculty, in the University, and particularly in the College of Arts and Sciences, did not reach the top rank in comparable numbers as men did was evident from the massive discovery in which the plaintiff left no pebble unturned (A-59). Disparate impact data is not a separate violation or cause of action or theory. It is evidence that may show that individual justifications for failure to promote women are simply not credible

when viewed in the aggregate. It is a name given to evidence so overwhelming that it is difficult to justify on an individual basis.

No other circuit has adopted the requirement that disparate impact, as a method proof, must be alleged in the complaint or articulated prior to trial. The Eleventh Circuit follows the rule that the words "disparate treatment" do not have to be pled. Those words are merely applicable to the legal analysis of the trial evidence. This circuit now holds that the words "disparate impact", however, constitute a form of legal action. Thus, if a district judge does not recognize disparate impact evidence not formally declared, he has not erred.

If disparate impact must be alleged as a discrete cause of action, then Federal Rule of Civ. Proc. 15(b) must apply to civil rights cases as to all other actions. *Menendex v. Perishable Distributors, Inc.*, 763 F.2d 1374 (11th Cir. 1985). In this case, disparate impact data was introduced without objection from any defendant. Indeed, the defendants expected statistical data to be introduced by the plaintiff and they announced their intention to disprove the existence of any pattern of sex discrimination in faculty promotion (A-91). Notwithstanding the clear intention of all parties, the trial judge found there had been no evidence of disparate impact and the appellate court would not find error since the plaintiff had not expressly set out the words as an allegation in the complaint (A-10).

II. University President's Unilateral Alteration And Raising Of Criteria For Faculty Promotion, Which Actions Have A Disparate Impact On Female Faculty, Violate Due Process And Equal Protection Guarantees Of The Fourteenth Amendment.

The Alabama Supreme Court in *Hoffman-LaRoche, Inc. v. Campbell*, 512 So.2d 725, 733 (Ala. 1987), has expressly held that a policy contained in an employee manual may become a binding contract and restrict the employer's ability to make

whatever rules he wishes. This employee-faculty manual gives rise to the due process, equal protection claims and 42 U.S.C. § 1983 claims. *Lassiter v. Covington,* 861 F.2d 680 (11th Cir. 1988). The faculty handbook (A-60 - 74) of the University of Alabama constitutes the "clearly defined set of policies and guidelines concerning the fundamental personnel considerations of . . . promotion and is regarded as an essential feature of the successful and harmonious operation of the institution (A-74). When defendant Joab Thomas came to the University in 1981, he unilaterally changed the promotion criteria by raising scholarship standards for promotion (A-9). The faculty handbook (A-60 - 74) setting forth the standards for the plaintiff's promotion to professor was in effect before 1981 when Thomas became president and when he denied the plaintiff's promotion in 1982, 1983 and 1984. Defendant Thomas was aware of the handbook when he came in 1981 (A-85). The handbook was not changed until 1985 to conform to his desire for raised standards (A-89). The 1981 increasing of the standards resulted in an especially higher level of scrutiny for applicants to promotion to the rank of full professor (A-6). In 1984-85 only fifteen (15%) percent of the female faculty at the University of Alabama were at full professor rank whereas forty-two (42%) percent of the men were (A-84). In the College of Arts and Sciences where the plaintiff taught, 124 males and 6 females had achieved full professor rank (A-92). This court has held that a statistical showing of disparate impact reaches the level of "gross disparity", when the difference between the expected treatment and the actual treatment of a protected class is greater than two or three standard deviations. *Castaneda v. Partida,* 430 U.S. 482, 496-97 n.17 (1977). The 1985 self-study conducted by the defendant University concluded that these skewed University-wide statistics arose due to a "rank problem [which] is related to the functional role which historically has been assigned to women . . . " (A-84).

Women faculty were concentrated in lower ranks (A-84) and the 1981 action of the President in "raising" standards served to lock in a disproportionately large number of women to the lower academic ranks. Previously, this Court

has held that action which freezes a disporportionately large number of blacks at a discriminatory level is violative of Title VII. *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971), *Albemarle Paper Co. v. Moody,* 422 U.S. 405 (1975). The appellate court was required, but failed, to view the totality of the evidence, *Bazemore v. Friday,* 478 U.S. 385 (1986), and straight-jacketed the evidence instead. There can be no doubt that the top rank of professor was a male job in the College of Arts and Sciences where only six women had ever been so promoted. This amounts to sexual "identifiability" of a subjectively-selected position, *Albemarle, supra* at 409, which defendants admitted in their self-study did not arise from innocent causes, *Watson v. Fort Worth Bank and Trust Co.,* 101 L.Ed.2d 827 (1988), but from a long record of intentional sex discrimination. An unjustified requirement of more publications for promotion is unlawful where the requirement keeps women in lower academic ranks. *Connecticut v. Teal,* 457 U.S. 446 (1982).

Increased publication of scholarly articles by faculty may be a facially neutral requirement but raising publication requirements, especially for the top rank into which few women had risen, is a barrier invidiously operating to discriminate on the basis of sex. *Griggs v. Duke Power Co., supra.*

Defendant Thomas's abandonment of the faculty handbook criteria and substitution of his own private criteria deprived the plaintiff of due process rights granted to her by the Fourteenth Amendment and 42 U.S.C. § 1983. The faculty handbook is an employee manual which conveys a property interest to the plaintiff and it may not be arbitrarily taken away. *Board of Regents v. Roth,* 408 U.S. 564 (1972).

The equal protection clause of the Fourteenth Amendment is violated when men have been historically judged by one academic standard and women by another, and the results of those actions are locked in by "raised" standards operating as present and future built-in headwinds for a protected class. *Griggs v. Duke Power Co., supra* at 432. Title VII of the Civil Rights Act of 1964, as amended, means that

> tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox.
> . . . It has — to resort again to the fable — provided that the vessel in which the milk is preferred be one all seekers can use. The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.

Griggs v. Duke Power Co., supra at 431.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of *certiorari* to the Court of Appeals for the Eleventh Circuit to consider the questions presented in this Petition.

Respectfully submitted,

Susan Williams Reeves
Counsel of Record for Petitioner

OF COUNSEL:
SUSAN WILLIAMS REEVES
REEVES & STILL
714 South 29th Street
Birmingham, Alabama 35233
(205) 322-6631

February 6, 1989

APPENDIX

APPENDIX

CONSTITUTIONAL PROVISIONS AND STATUTES

UNITED STATES CONSTITUTION, AMENDMENT 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 2000-2(a)

(a) Employers. It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual or employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit

in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-7817

KATHLEEN JOHNSON WU,

Plaintiff-Appellant,

versus

DR. JOAB THOMAS, President of the University of Alabama, in his official capacity;
DOUGLAS JONES, Dean of the College of Arts and Sciences, officially and in his individual capacity, and
THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA, a body corporate,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

ON PETITION(S) FOR REHEARING
(November 10, 1988)

BEFORE: RONEY, Chief Judge, TJOFLAT, Circuit Judge and PAUL*, U.S. District Judge

PER CURIAM:

The petition(s) for rehearing filed by appellant KATHLEEN JOHNSON WU is denied.

ENTERED FOR THE COURT:
/s/ Paul H. Roney

United States Circuit Judge

*Honorable Maurice M. Paul, U.S. District Judge sitting by designation.

Kathleen Johnson WU,
Plaintiff-Appellant,

v.

Dr. Joab THOMAS, President of the University of Alabama, in his official capacity; Douglas Jones, Dean of the College of Arts and Sciences, officially in his individual capacity, and the Board of Trustees of the University of Alabama, a body corporate, Defendants-Appellees.

No. 86-7817.

United States Court of Appeals,
Eleventh Circuit.

June 7, 1988.

Appeal from the United States District Court for the Northern District of Alabama.

Before RONEY, Chief Judge, TJOFLAT, Circuit Judge, and PAUL*, District Judge.

PAUL, District Judge:

FACTS

Appellant, Kathleen Johnson Wu, is an associate professor in the Department of Philosophy at the University of Alabama, Tuscaloosa, Alabama, having been hired into that department in 1972 at the rank of assistant professor. Appellant was promoted to the rank of associate professor in 1975 and received tenure in 1976. The facts concerning appellant's schooling and employment history, both before and after being employed at the University of Alabama, are chronicled in the memorandum opinion of the district judge and are not in serious dispute. The inferences and conclusions to be drawn from these facts are disputed.

---

*Honorable Maurice M. Paul, U.S. District Judge for the Northern District of Florida, sitting by designation.

Essentially, appellant was hired by the University of Alabama because it was vigorously trying to recruit her husband, Dr. H. K. Wu, who was then Chairman of the Department of Economics at Boston University, and he required, as a condition to his coming to the University of Alabama, that his wife also be hired. The deal was struck and appellant was offered, and accepted, a regular appointment as an assistant professor in the Department of Philosophy at an agreed salary of $10,500 for a nine month teaching assignment. It appears from the record that this beginning salary was commensurate with her training and experience and comparable to that of Dr. Norvin Richards, a male faculty member hired by the University of Alabama during the preceding academic year (1970-71) as an assistant professor in the Department of Philosophy at a rate of $10,200 for a nine month term; at the time appellant was hired, Dr. Richards' salary was raised to $10,700 for the 1971-72 academic year. Dr. Richards is noted here because he is the individual appellant has chosen as her major comparator to show that female faculty members are treated less favorably than male faculty members, that is, are discriminated against on account of sex.

In 1975, appellant was promoted to the rank of associate professor; she applied for promotion to full professor in each of the academic years 1980-81, 1982-83, and 1983-84 and was denied promotion on each occasion. It is the denial of promotion to full professor that instigated this lawsuit.

The record shows that decisions on faculty promotions are based on a series of reviews and recommendations from several levels within the University, from the departmental level up to the President of the University, with the president having ultimate or final word on each promotion. Further, there is no quota on the number of full professorships available at the University of Alabama and no competition among the faculty for such promotion. The only competition for promotion to full professor is from within one's self to obtain the degree of scholarly work, teaching, and service that would merit such promotion.

The record also shows that beginning with the tenure of

Dr. Joab Thomas as President of the University of Alabama, there was an increased focus and purpose to raise the level of academic performance and scholarship, with renewed emphasis on research, so as to make the University of Alabama a major research institution. To accomplish this goal, it appears from the record that, whatever the criteria employed before 1981 (when Dr. Thomas became President of the University), the focus thereafter in considering promotions was the necessity for research productivity. The record further shows a higher level of scrutiny to which promotions, pay raise, and sabbatical leave recommendations were received and acted upon by the upper levels of administration. (Tr. 21). As found by the trial judge, " . . . there is an even greater emphasis on continuing research and scholarship given to applicants for promotion to the rank of full professor, as compared with applicants for promotion to lower ranks or applicants for tenure." (pp. 19-20 of memorandum opinion).

The appellant filed her amended complaint for relief against Dr. Joab Thomas, in his official capacity as President of the University of Alabama; Douglas Jones, Dean of the College of Arts and Sciences in both his individual and official capacity; and the Board of Trustees of the University of Alabama in four counts:

Count I — based on a denial of "due process" under the United States and Alabama Constitutions, alleging all defendants acted arbitrarily in denying her promotion to full professor;

Count II — based on a denial of "equal protection" under the United States Constitution, 42 U.S.C. §§ 1983 and 2000e, alleging she was denied promotion to full professor on account of her sex, that is, she is female;

Count III — alleging a "breach of agreement" causing her economic and professional injury as well as mental distress; and

Count IV — based on the Equal Pay Act of 1963, 29 U.S.C. § 206, alleging discrimination in pay on account of her sex.

Appellant requested the court to:

1) require defendants to confer upon her the rank of full professor;
2) award compensatory and liquidated damages for violation of the Equal Pay Act;
3) award back-pay and pre-judgment interest for violation of 42 U.S.C. §§ 1983 and 2000e *et seq.*;
4) award compensatory and punitive damages against the defendants Douglas Jones and Joab Thomas for breach of contract; and
5) award attorney fees under 42 U.S.C. § 1988.

The defendant Douglas Jones was dismissed as a party-defendant by the court, both in his individual and official capacities, in the pre-trial order of May 22, 1985. (RA-Ex. 33); Count three, the plaintiff's breach of contract claim, was dismissed by the court on March 7, 1985 (RA-Ex. 19) because (a) as an alleged oral contract against the defendants Jones and Thomas in their "official capacity" it was subject to dismissal under Alabama law of sovereign immunity, and (b) individually, based on the " . . . oral representation of plaintiff's counsel . . . that plaintiff does not claim to have a contract with any individual defendant."

The court alternatively declined to exercise the pendent state law jurisdiction on the contract claim, fraud claim, or claim based upon the Alabama Constitution (RA-Ex. 19).

Summary judgment was entered in favor of the defendants as to plaintiff's 42 U.S.C. §§ 2000e *et seq.* claim pertaining to the application for promotion in both the 1981 and 1982 applications, leaving only the plaintiff's 1983 denial of promotion for trial under 42 U.S.C. §§ 2000e *et seq.* Defendant's motion for summary judgment as to the plaintiff's Equal Pay Act claim was denied, leaving this issue also for trial, along with plaintiff's *prospective* claim for relief under 42 U.S.C. § 1983 and the Fourteenth Amendment. (These rulings were actually made in open court on March 31, 1986 [Vol. 1 of trial transcript] but were memorialized by a written order on May 20, 1986 [(RA-Ex. 63]).

DISCUSSION

A. Title VII

1. Discriminatory Intent

[1] Appellant contends that the district court erroneously ruled that appellees did not discriminate against her on the basis of sex in their promotional decisions. A complainant in a suit brought under Title VII of the Civil Rights Act of 1964, §§ 701 *et seq.*, 42 U.S.C. §§ 2000e *et seq.*, bears the burden of proving a prima facie case of discrimination. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973). To establish a prima facie case of discrimination in promotion, a plaintiff must prove: (1) he or she is a member of a protected minority; (2) was qualified for and applied for the promotion; (3) was rejected despite these qualifications; and (4) other equally or less qualified employees who were not members of the protected minority were promoted. *Perryman v. Johnson Products Co., Inc.,* 698 F.2d 1138, 1142 n. 7 (11th Cir.1983). Once the plaintiff has established a prima facie case of discrimination, the burden shifts to the employer "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *McDonnell Douglas,* 411 U.S. at 802, 93 S.Ct. at 1824. If the defendant carries this burden of production, the plaintiff must either "directly persuad[e] the court that a discriminatory reason more likely motivated the employer or indirectly [prove discrimination] by showing that the employer's proffered explanation is unworthy of credence." *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 256, 101 S.Ct. 1089, 1095, 67 L.Ed.2d 207 (1981).

[2, 3] The district court determined that appellant failed to establish a prima facie case of sex discrimination. A district court's findings of fact are subject to the clearly erroneous standard of review enunciated in Rule 52(a), Federal Rules of Civil Procedure. "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.,* 333 U.S. 364, 395, 68 S.Ct. 525,

542, 92 L.Ed. 746 (1948). "This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985). After a thorough examination of the record and review of the testimony, we cannot conclude that the district court's findings are clearly erroneous.

The district court correctly concluded that appellant failed to show she was qualified for the position of professor and that an equally or less qualified male was promoted to professor during that time. According to the 1978 edition of the faculty handbook, an individual seeking promotion to the rank of professor should show, among other things, evidence of continuing scholarship and contribution. Since the arrival in 1981 of Dr. Joab Thomas as President of the University of Alabama, the standards for promotion have been elevated with increased attention to evidence of continuing research and scholarly works. The record reveals, and the district court found, that although appellant demonstrated a commendable record of scholarship upon her application for and advancement to associate professor in 1974, her level of productivity declined significantly thereafter. Between the years 1975 and the time of her first application for full professorship in 1981, appellant's scholarship decreased by almost half. From 1981 until the time of trial, appellant failed to produce any published journal articles. Appellant clearly failed to show she was qualified for promotion to professor.

Appellant also failed to prove that an equally or less qualified male was promoted during the time of her promotional application. In 1981 and 1982, Norvin Richards, associate professor in the Department of Philosophy, submitted applications for promotion to professor and was likewise rejected. Comparatively, the record discloses, and the district court found, that Richards was more qualified than appellant as evidenced by the regularity and recency of his publications. The documentary and testimonial evidence further supports the district court's conclusion that other

proffered comparators displayed qualifications superior to those of appellant.

In sum, the record evidence supports the district court's conclusion that appellant failed to prove a prima facie case of discrimination based on sex. Notwithstanding appellant's failure to establish a prima facie case, the district court considered whether appellees articulated a legitimate, non-discriminatory reason for their decision not to promote appellant. Appellees' proffered explanation that appellant was not promoted because of her lack of continuing research and scholarship is substantiated by the testimonial and documentary evidence adduced at trial. Accordingly, we cannot conclude that the district court's factual findings are clearly erroneous.

2. Disparate Impact

[4] Appellant contends that the district court erred in its determination that appellant had neither alleged not introduced evidence supporting recovery under a disparate impact theory. We disagree. Our review of the record shows that appellant did not allege disparate impact in the second amended complaint and did not argue the theory at trial. During appellant's opening argument, no mention was made of intent to proceed under disparate impact theory. We conclude that appellant did not present a disparate impact claim to the district court and, therefore, the court's failure to examine the evidence in light of that theory is not clear error. *See Smith v. Horner,* 839 F.2d 1530, 1535 (11th Cir.1988).

B. Section 1983

[5, 6] Appellant's action is also brought pursuant to 42 U.S.C. § 1983 and alleges that by discriminatorily denying her promotion to professor, appellees abridged her constitutional rights to due process and equal protection under the fourteenth amendment. The district court properly found that there was no merit to appellant's claim because a prospective promotion is not a property or liberty interest

protected by the fourteenth amendment. *See Doyle v. University of Alabama in Birmingham,* 680 F.2d 1323, 1326 (11th Cir. 1982) ("no protected property interest in the mere recommendation for a raise"); *see also, Clark v. Whiting,* 607 F.2d 634, 641 (4th Cir. 1979). Moreover, the same factors pertinent to our decision on appellant's Title VII claim persuade us that the district court did not err in finding no evidence of discriminatory motive on the part of appellees in refusing to promote appellant to professor. The substantiated findings demonstrate that appellant was denied the position because she failed to demonstrate continuing scholarship.

C. Equal Pay Act

[7] Appellant contends that the district court erroneously failed to find that she was a victim of discrimination in pay. To establish a prima facie case under the Equal Pay Act of 1963, 29 U.S.C. § 206(d), a complainant "must show that an employer pays different wages to employees of opposite sexes 'for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.' " *Corning Glass Works v. Brennan,* 417 U.S. 188, 195, 94 S.Ct. 2223, 2228, 41 L.Ed.2d 1 (1974) (quoting 29 U.S.C. § 206, 29 U.S.C.A. § 206(d)(1)). Once a plaintiff makes out a prima facie case, the burden shifts to the employer to prove that the difference in pay is justified by one of the four exceptions in the Equal Pay Act: "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex." *Corning Glass Works,* 417 U.S. at 196, 94 S.Ct. at 2229 (quoting 29 U.S.C. § 206(d)(1)).

The district correctly concluded that factors other than sex justified the pay disparity between appellant and the primary comparator, Norvin Richards. The record shows, and the district court found, that appellant was hired as an assistant professor in the Department of Philosophy for the academic year 1972-73 at a salary of $10,500. Richards was hired two years earlier as an assistant professor at a salary of $10,200. As of 1972, his salary had been raised to $11,350. Initially,

the district court concluded that an action based on the pay disparity in original pay is barred by the applicable statute of limitations in 29 U.S.C. § 255(a). Nonetheless, the district court found that the $850 difference is explainable, in part, by Richards' greater teaching experience. The record reveals additional contributions by Richards, over those of appellant, through his duties as acting chairperson of the department and participation in the Honors Program. Any present pay disparity can be further justified by Richards' more recent and regular scholarly production as discussed above.

Appellant attempted to demonstrate pay disparity through the salary analyses of expert witness George Ignatin. The testimonial evidence reveals that these calculations failed to take into account non-discriminatory factors that might affect salary such as seniority, teaching ability and scholarly production and, further, failed to compare the salaries of all Department of Philosophy faculty holding substantially equal jobs. For these reasons, we cannot find that the district court committed clear error in the probative weight it assigned to the analyses of appellant's salary expert.

D. Pendent Jurisdiction

[8] By order dated March 8, 1985, the district court dismissed appellant's claims based on state law. Appellant contends that the district court abused its discretion in refusing to exercise pendent jurisdiction. We disagree. "It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims. . . ." *United Mine Workers of America v. Gibbs,* 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966). After consideration of the factors set forth in *United Mine Workers of America v. Gibbs,* the district court determined that additional legal theories would increase the likelihood of jury confusion and that dismissal would promote judicial economy and fairness to the litigants. We cannot conclude that district

court's decision to not exercise pendent jurisdiction constitutes an abuse of discretion in this case.

E. Sovereign Immunity

[9] Appellant's second amended complaint contained breach of contract allegations asserted against defendant Douglas Jones, Dean of the College of Arts and Sciences, in both his official and individual capacities. By order dated May 22, 1986, the district court dismissed defendant Jones from the lawsuit. Although no reason is stated in that order for the dismissal, the district court's reasoning appears in an earlier order wherein it is stated that defendant Jones is dismissed in his official capacity based on Alabama law of sovereign immunity and in his individual capacity based on oral representations of appellant's counsel that plaintiff had no contract claim with any individual defendant. We are cognizant that, under Alabama law, actions brought to compel state officials to perform their legal duties are not barred by constitutional sovereign immunity. *Stark v. Troy State University,* 514 So.2d 46, 50 (Ala.1987). Appellant's second amended complaint seeks to compel defendants to confer upon her a full professorship. However, defendant Jones has no ability to promote appellant to professor. The record shows, and appellant recognizes in her complaint, that Jones makes recommendations which are either finally approved or disapproved by Dr. Joab Thomas. Accordingly, the district court did not err in dismissing him from this lawsuit. *See Stark v. Troy State University,* 514 So.2d 46 (Ala.1987).

CONCLUSION

Appellant failed to establish a prima facie case of discrimination in employment based on sex, and appellees articulated non-discriminatory reasons for failure to promote her. Therefore, we hold that appellant has failed to demonstrate that appellees discriminated against her in their promotional decisions. In addition, appellees established justifiable reasons for the minimal pay disparity existing between Norvin Richards and appellant. For the reasons stated above, the judgment of the district court is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

KATHLEEN JOHNSON WU,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION
	)	NO. 84-G-2159-W
DR. JOAB THOMAS, President of The University of Alabama, in his official capacity; and THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA, a body corporate,	)	
	)	
Defendants.	)	

FINAL JUDGMENT ORDER

In conformity with and pursuant to the Memorandum Opinion entered contemporaneously herewith, it is

ORDERED, ADJUDGED and DECREED that final judgment be and it hereby is entered in favor of the defendants and against the plaintiff, and plaintiff shall have and recover nothing of the defendants.

DONE and ORDERED this _____ day of October 1986.

/s/ J. Foy Guin, Jr.

UNITED STATES DISTRICT JUDGE
J. FOY GUIN, JR.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

KATHLEEN JOHNSON WU,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION
	)	No. 84-G-2159-W
DR. JOAB THOMAS, President of the University of Alabama, in his official capacity; and THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA, a body corporate,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

This case was filed by the plaintiff, an associate professor in the Department of Philosophy, at the University of Alabama at Tuscaloosa, and came on for trial before the court, sitting without a jury, on her complaint claiming under Title VII of the Civil Rights Act, 42 U.S.C. § 1983, and the fourteenth amendment to the United States Constitution. The court has by prior order limited the section 1983 and fourteenth amendment claims to claims for prospective injunctive relief. Those injunctive relief claims relate to denial of the plaintiff's pay, promotional or other claims based on arbitrariness, unequal protection, and sex discrimination. The Title VII claim is purely a sex discrimination claim. The remaining defendants include The Board of Trustees of the University of Alabama and Dr. Joab Thomas, in his official capacity as President of the University. The court has carefully considered all the evidence and the lengthy record, and is of the opinion that the plaintiff has not

carried her burden of proof as to any of these issues. Consequently, by separate order, for the reasons given herein, judgment will be for the defendants.

Kathleen Wu had attended Bryn Mawr College where she graduated cum laude in Philosophy. She received her Masters and Ph.D. degrees in Philosophy from Yale in 1967 and 1970 respectively. She received several prestigious grants and fellowships. Prior to applying for a faculty position at the University of Alabama, she had also been a teaching fellow at Yale and a lecturer at Suffolk University at Boston. Additionally, Dr. Wu was a published philosopher prior to applying for a faculty position at the University of Alabama.

When Dr. Wu applied in 1972 to join the Philosophy faculty, the University had a temporary full-time vacancy since one of its regular faculty members was taking leave. The circumstances of the plaintiff's application actually, however, revolved around the defendants' vigorous recruitment of H. K. Wu, the plaintiff's husband, in 1972. Dr. H. K. Wu was, in 1972, Chairman of the Department of Economics at Boston University and was not applying for or interested in other employment. Also in 1972, Kathleen Wu was interviewing in the Boston area where her husband was employed. Because there appeared to be excellent career opportunities for both of them at the University, H. K. Wu indicated that he would consider the University if the University would consider Kathleen. The University agreed. Dr. Wu was offered a regular appointment as an assistant professor in the Department of Philosophy, which she accepted.

The evidence showed that at one time there was sex discrimination as to female faculty salaries at the University of Alabama. This was not vigorously litigated because it is not one of the issues in this case. The evidence does show that the University has made affirmative efforts to eliminate perceived salary inequality in granting raises intended to equalize possibly perceived sex discrimination in the salaries of female faculty. This plaintiff received several such raises.

The plaintiff applied in three separate years to be promoted to the rank of full professor. Her first application was

filed in the fall of 1981. That application was deferred in the spring of 1982. The second application was made in 1982 and denied the following spring of 1983. The third application was dated 1983 and was denied in spring of 1983. The third application was dated 1983 and was denied in spring 1984. She had been reviewed on each application by a departmental committee which was comprised of Dr. Leon Weinberger, Dr. Marvin Karson, Dr. James Clark, and Dr. J. B. McMinn. Each of those individuals, with the exception of Marvin Karson, had served on the faculty of the Department of Philosophy. Leon Weinberger is a research professor in the Department of Religious Studies, although the courses he taught were once part of the Philosophy Department curriculum.

In the fall of 1981 the plaintiff received a unanimous favorable vote from her inter-departmental committee after a full and thorough review of her publications, her teaching record, and her service record. Drs Weinberger and Clark testified that they met for several hours on three or possibly four occasions to discuss Dr. Wu's scholarship and promotional file. The departmental committee concluded that Dr. Wu was well qualified to be promoted to the rank of professor. Dr. Karson testified that her publications in logic were difficult and complex for him to comprehend, but that his knowledge of probabilities, common in statistics, gave him some background to understand her writings in logic.

In addition to this collective expertise, the Philosophy Department Chairman, Max Hocutt, on November 30, 1981, added to that promotional recommendation by advising the Dean of the College of Arts and Sciences, Douglas Jones, that "Dr. Wu is well qualified for the rank of full professor on all counts." He added: "Dr. Wu has published a considerable number of elegantly wrought essays in the leading journals." Dr. Hocutt testified that the use of the word "elegant" with respect to writing in the field of logic has a particularly complimentary meaning in that the term refers to the most lucidly and well-expressed research. Certainly, the inter-departmental committee and the Philosophy Department chairman left no doubt that their considered judgment was

that Dr. Wu had met and exceeded the University of Alabama's standards for becoming a professor.

Also in the fall of 1981, Dr. Hocutt recommended the highest percentage salary increase for the plaintiff in recognition of her fine publication record. At the same time Dr. Hocutt notified the Dean that he too should recognize Dr. Wu from a "Special Recognition Fund," due to her extraordinarily fine record. It is the court's understanding that the Special Recognition Fund ws used to make salary corrections to correct perceived inequalities of female faculty pay.

According to the Faculty Handbook, one promoted to the rank of professor must have a "record of outstanding achievement in two of the areas of instruction, research, and service to the University, . . . a record of activity and interest in the other areas, and show evidence of continuing scholarly interest and contribution." (The University of Alabama Handbook (1978), p. 31.)

In November 1981, Dr. Hocutt endorsed the plaintiff's teaching in the highest terms possible, saying: "Dr. Wu has become a good teacher by whatever standard you care to use." She gave him her course evaluations, and he thought they were good. Regarding service, her department chairman advised that she had done her share; that she had revived the Philosophy Club at the University and had been its sponsor for years; that she volunteered for other committee service; and that she taught courses on an overload basis and directed the only master's thesis awarded to a philosophy student. Plaintiff's promotional file showed that many distinguished philosophers held a high opinion of her. Doubtless, her publication record up until 1981 was more than satisfactory.

The plaintiff was denied promotion to full professor in 1982. Defendant Thomas testified that he had no independent recollection of why he decided against the promotion. The sole evidence at trial supporting denial in any way was a report of an arts and sciences promotion committee and comments by Dean Jones dated February 1, 1982. The Dean wrote in his comments: "Research by the candidate I consider excellent; teaching, while improving, is not outstand-

ing, in my opinion. . . . The candidate is encouraged to continue apparent good efforts to improve teaching and service aspects of her responsibility to the department." (P's Ex. 35, Comments by Dean Jones, Feb. 1, 1982.) The divisional committee noted "widespread recognition for her research" but that service and teaching effectiveness were insufficient for promotion. The divisional committee voted for deferral of promotion, saying "[t]he candidate is doing well and improvement in these areas should result in promotion in the near future." (P's Ex. 35, Divisional Committee Recommendation, Jan. 21, 1982.) In any case, the deferral recommendation by the Dean on February 1, 1982, produced a complaint from her own department chairman, who urged reversal of the Dean's negative recommendation, saying her file contains "student evaluations indicating that she is at or above the departmental mean, although she teaches what are generally acknowledged to be the most difficult and demanding courses in the department." (P's Ex. 20, letter dated Feb. 2, 1982, from Dr. Max Hocutt to Dean Jones.) This appeal to the dean to change his opinion about her teaching was unsuccessful.

Plaintiff argues that Dr. Wu was not the only woman not promoted in 1982; that in the 1981-82 year Dean Douglas Jones voted to deny the full professor rank to Virginia Foscue, saying that her scholarship was insufficient for promotion to the highest rank; and that he recommended denial of promotion of Claudia Johnson to the rank of full professor while questioning the scholarship of both women.

Dr. Foscue, who had been at least twice unsuccessful in securing full professor rank, and who, in 1981-82, had negative recommendations from the divisional committee, Dean Jones and Academic Vice-President Sayers, made a special plea to President Thomas. Plaintiff contends that Dr. Foscue obtained her promotion by asking her brother-in-law, David Vann, a lawyer in Birmingham, to write Dr. Thomas personally on her behalf. There is no evidence that any such letter played any part in her promotion. The evidence does show that Dr. Thomas rejected the adverse recommendations and did promote Dr. Foscue. She testified that there

had been a misunderstanding about two of her publications which had been considered articles by the chairman of the learned society which published her two monographs. They were in fact the equivalent of books. The chairman corrected himself and informed Dr. Thomas of his error. She personally gave Dr. Thomas letters from the society chairman and another which clarified the misunderstanding about these publications. When she was promoted, she had published two monographs and one long article of monograph length. She said that she had not been alone in having difficulty in explaining linguistics publications to a divisional committee. She was not aware of any discrimination against her by reason of sex. She is now a full professor of English at the University.

Plaintiff also contended that Dr. Claudia Johnson, now the Chair of the Department of English, was discriminated against by reason of sex. Dr. Johnson is indeed a distinguished scholar. She testified in the case that she had not been discriminated against. She applied for promotion to the rank of full professor twice before she obtained the promotion. She published a book before she was promoted. That is required by the departmental standards of her department. The evidence also shows that Dr. Johnson has received very large merit increases in salary since her promotion, and is now one of the highest paid professors in the College of Arts and Sciences. Her salary is either second or third in that department. Indeed, she does not appear to have been discriminated against.

It does appear that the University gave the plaintiff a deferral of promotion on her first application to allow her to show teaching excellence. It also appears that she did not show that she had improved adequately in teaching excellence until her third application. In the meantime, she quit publishing. The University does require evidence of continuing scholarly research. This is interpreted to mean publication of articles or longer publications based upon that research. The University did not challenge the scholarship of the plaintiff's publications, but did challenge the fact that after 1981, pending the decisions on these applications for

promotion to full professor, she quit publishing. Thus, she failed to meet the requirement of showing evidence of continuing scholarly research. When she did finally improve her teaching ability, she could not then meet the requirement of showing evidence of continuing scholarly research.

The plaintiff complains that she is caught in a numbers game — that the University is engaging in counting the number of publications, while ignoring the quality. The University does not deny that her earlier publications were of high quality. The University replies that it is not a matter of numbers, but rather a matter of no publication at all after 1981, until sometime later when there was no pending application. There was some dispute in the testimony whether the University's requirement meant that it was necessary to publish somthing every year. Nevertheless, it is not disputed that the University has a requirement that there be evidence of continuing scholarly research. The plaintiff claims she was working on two books, but she does not claim that either had been accepted for publication. It is difficult for scholars in one field or discipline to judge the scholarship of researchers in another field. If their articles are accepted for publication in what is known as "refereed journals" or if their books are accepted by publishers for publication, that constitutes evidence of continuing scholarly research. An exception needs to be made here for textbooks, which are usually written at a level lower than that evidencing scholarly research. For scholars in a different field, there is no practical way to judge the quality of a book which has not been accepted. Consequently, professors from different fields or disciplines give no credit for work in progress until it has been accepted for publication.

Complaint is made that Dr. Thomas spent only three minutes looking at plaintiff's application on her third try. This was his estimate of the maximum time he spent on it, but he explained that he looked for evidence of continuing scholarly research and found none, and that ended the matter as far as he was concerned, as the recommendations through the many-tiered hierarchical system were uniformly negative except at the department level, the lowest level.

The University system for deciding questions of promotion is described as follows: The lowest level is the departmental level. A divisional committee (here, the Committee of the College of Arts and Sciences) then considers the recommendation from the departmental committee. The divisional committee recommendation then goes to the Dean's office, where an EEO coordinator (here, a woman) always checks it for signs of discrimination. Once the Dean and his staff have considered the matter and discussed it, the Dean makes a recommendation, which then goes to the Vice-President for Academic Affairs, who makes a recommendation, and the whole file then goes to the President of the University, Dr. Thomas. He has the ultimate responsibility for the decision, and has the right to overrule all the decisions made below, which he rarely does, but does do in an appropriate case, such as that of Dr. Foscue.

Dr. Wu always got the approval of her departmental committee. She never got the approval of the divisional committee, nor of the Dean nor of the Vice-President for Academic Affairs, nor of the President. She was promoted in 1975 to the rank of associate professor, a rank she still holds. She had no difficulty achieving that rank. She is not alone in remaining in the rank of associate professor for a number of years prior to promotion to the rank of full professor. The Vice-President for Academic Affairs, Dr. Roger Sayers, is in fact still an associate professor, after many, many years in that rank. Dr. Harriet Cavell is the Director of External Degree Programs for New College at the University. She still has the rank of associate professor. She was warned when she went into administration that it would be very difficult for her to be promoted to full professor while working in administration, because it was difficult to do the necessary research. She does not consider herself to have been discriminated against by reason of sex. Other associate professors have been given merit pay increases well beyond the norm because of the quality of their work or quality of their public service, or scholarship, or some combination of these, all without being promoted to full professor. The merit pay increases have nothing to do with departmental rank and, in

fact, many associate professors make much more than some full professors. Associate professor is an honored rank.

Plaintiff complains that the divisional committees never included anyone with any expertise in philosophy during the three years that plaintiff's three promotion applications were being considered. The testimony of her witness, Dr. Hugues Leblanc, affirms that this is indeed a problem elsewhere, and even at his own university. Philosophers are not a numerous tribe. It is also evident from the evidence in the case that they do not consider themselves to be fully understood by professors in other disciplines. From the evidence in the case, the court believes this to be true, that philosophers indeed have difficulty in communicating to others of different disciplines the importance and meaning of much of the research in their own field. It is no doubt true that many professors of other disciplines look down upon philosophy and upon much of the research that takes place within that discipline. The court cannot help this. The court believes this is a fact of academic life with which philosophers will simply have to contend as best they can.

What the court is concerned with is whether any of the reasons given by the University for failing to approve plaintiff's promotion applications are pretexts for sex discrimination. This plaintiff may well have been mistreated by some of the professors who sat on the divisional committees, or even by her Dean or the Academic Vice-President or the President, because of their failure to understand the true worth of her research and publications. The court does not believe that that happened in this case, simply because of the lack of any evidence of continuing scholarly research during the period of time in question, 1981-84. Even, however, if such mistreatment did happen, that did not show discrimination by reason of sex. The court does not believe that there was discrimination. However, if there was, it was discrimination against the plaintiff as a philosopher, not as a woman.

There is some dispute in the record whether the standards for promotion at the University of Alabama have changed by reason of the selection of Dr. Thomas to be President of the University in 1981. The weight of the evidence supports a

finding that indeed the scholarship standards for promotion have been increased since Dr. Thomas became President, and the court so finds. He did testify that he expected a publication from the candidate every year prior to promotion. The court does not believe that this high standard is imposed by the other people in the hierarchy, nor does the court find that this requirement was necessarily imposed as to the plaintiff's application. Many witnesses testified that when an applicant was working on a book, it was not expected that the applicant publish every year. On the other hand, it was not expected that any credit would be given for the book until it was actually accepted for publication. No doubt the efforts of the plaintiff being expended on two books in preparation accounted for her lack of publication. On the other hand, she should not have expected to be credited with publications which in fact did not occur. She could have offered to refereed journals various portions of these books in the form of articles. This is frequently done. She did not do this. At the time of the trial, neither book had yet been accepted for publication. At least one of the witnesses from the University of Alabama testified that publication every year was not expected when a candidate was working on a book. That attitude toward books may vary. Dr. Leblanc testified that at Temple University they gave credit for working on a book, without presuming to ask whether it had been accepted for publication. That may be a perfectly reasonable approach. It is not the approach of the University of Alabama, and the evidence as to that point.

At this point, the court pauses simply to say that it believes Dr. Wu to be a scholar worthy of respect. It believes that if she persists she will obtain the promotion she seeks, if she continues to publish regularly over a period of years articles or books evidencing a high level of scholarly research. This she has done in the past. She has even done this to some extent since the last application, the one which was denied in 1984. The evidence has given the court no reason whatever to suppose that the University is determined either to deny her promotion or to slow it down. She should have made

some effort to continue the high level of regular publication which had been characteristic of her before 1982.

Plaintiff also contends that there are male professors in the Philosophy Department who were promoted according to a lower standard than the one that presently prevails and has been applied to her. This is true, but it does not bespeak discrimination against the plaintiff by reason of sex in the years 1982, 1983 or 1984. Before Dr. Thomas became President, many associate professors had been promoted to full professor with very little in the way of credited publications. The University had a right to raise its standards. It did so. It is not illegal discrimination to hold this plaintiff to the present high standards.

The plaintiff argues that she was the only member of her department to create an international stir. She did create something of a stir among philosophers in 1975. She had not stirred anything of any great note at or near the time of any of her three applications for promotion.

The burden is on Dr. Wu to prove not only that the denial of her promotion was improper, but also that it was caused by reason of sex discrimination. To meet that burden she must prove that the actions and recommendations upon which those actions were based were infected by discriminatory animus. Plaintiff's counsel admitted early in the trial that she must show intent. This she has failed to do. Title VII does not impose a burden of infallibility in promotion and pay decisions. The University makes no claim of perfection in all of its decisions. It does, however, go to great lengths to ensure that such decisions are subjected to several layers of review and analysis; that faculty members have every opportunity to present material and arguments on their behalf, and that the gender or race of a faculty member has nothing to do with rank or pay.

The court was especially impressed with the testimony of Dr. Elizabeth Meese. Dr. Meese is an associate professor of English. She has been at the University of Alabama since 1975. During the years 1981-85, she was Assistant Dean of Arts and Sciences. As Assistant Dean, she worked with faculty in Humanities and Fine Arts concerning raises,

promotions, budget, and scheduling. She was the affirmative action coordinator for the College of Arts and Sciences, including pay issues.

Dr. Meese testified that pay commonly overlaps in the ranks of professor and associate professor. Factors influencing pay include (1) level of individual productivity, (2) the fact that many younger people are hired at higher levels because the University must pay competitive salaries to get good people, (3) the fact that the system of awarding merit raises sometimes produces an associate professor earning more than many full professors. In fact, this is the case with Dr. Meese.

She testified that the University has procedures for pay monitoring. As affirmative action coordinator, she compared salaries of males and females, and of minorities, annually. She had to account for any apparent discrepancies as to females or minorities annually. She got a salary-rank sheet each year on the entire College of Arts and Sciences. She investigated apparent discrepancies by looking especially at the number of years at the University and disclosures shown by the faculty activity reports. Raises are all for merit; none for seniority. She monitored the Philosophy Department especially as to Drs. Richards (a male) and Wu. The University contends that the best and fairest comparison between a male and a female professor for the purposes of this case would be to compare Drs. Richards and Wu, both of whom are associate professors of philosophy, with similar periods of service at the University, and both of whom applied unsuccessfully for promotion to full professor in 1981 and 1982. Dr. Richards did not apply in 1983. The court will have more to say on that later. The witness had focused on the comparisons between these two professors for her own purposes as affirmative action coordinator, at least during the two academic years of 1982-83 and 1983-84. She found that the differential was justified by two factors: (1) the activity level, and (2) the time at the University. Dr. Richards has been at the University a bit longer than Dr. Wu.

The witness had responsibility in connection with promotions to prepare a draft evaluation of each applicant for Dean

Douglas Jones. She did not have input to either departmental or divisional committees. Her memo would be prepared after receipt of the report of the divisional committee, its statement and recommendation. She would review the same material submitted to the committee by the applicant. She made a negative recommendation as to Dr. Wu. Early, on the occasion of the first application, this negative recommendation was because of a lack of evidence of a high level of teaching ability. Later, the problem was lack of ongoing scholarly research. She testified that the University looks for evidence of continuous effort.

As to Dr. Richards, she made the same recommendation for the same reasons. He had finished a book but it had not been accepted for publication; and he was not, therefore, entitled to credit for it. Dr. Wu, at the time of trial, had not finished any book, much less had one accepted for publication.

Dr. Meese testified that the standards appled to Richards and Wu were the same. She also testified that the plaintiff filed no EEO complaint with her. She made the investigation because it was one of her duties to do so as a matter of course.

Dr. Meese has been active in women's organizations on campus. These include Women's Studies Advisory Committee, Capstone Women, and Equal Employment Opportunity Committee. She describes herself as a feminist. She testified that the promotion files of Drs. Wu and Richards were not comparable, because Dr. Richards had in fact completed a book, even though it had not been accepted. She thought, therefore, that Richards came closer to promotion than Wu but, of course, that neither was promotable during the years in question. As to annual raises, Dr. Meese testified there were three kinds: (1) annual merit raises, (2) equity raises (to adjust for past effect of, in this case, sex discrimination), and (3) raises by reason of promotion. Generally, a ten per cent raise followed a promotion to the rank of full professor. (There was one recent year when this was not done, because the governor of Alabama ordered proration, required by the Alabama state constitutional provision against deficit financing. Because of the reduction in the state appropria-

tion, it was not possible to give such raises that year.) When such a raise is given, merit raises are first given, and the ten per cent factor is then used to raise the new total. There are no across-the-board raises at the University of Alabama, for cost of living or for any other reason. Nor is there any minimum salary mandated for a full professor.

Dr. Meese testified with some vigor that there has been a difference in the standards for promotion since Dr. Thomas became President in 1981. She described it as "an increased attention to the need for research productivity." She also said, "[i]t comes . . . in the form of messages encouraging research productivity, messages that he gives not only to the faculty, but around the state citing the importance of that." She continued, "it also comes up in terms of the level of scrutiny to which the raise and promotion and sabbatical leave recommendations are now receiving at the upper administrative level. The Deans really must make cases and be prepared to defend the cases on a way that was not true before Dr. Thomas was here." (Trial testimony of Dr. Elizabeth Meese, p. 21.)

The record shows that the University of Alabama, under the leadership of Dr. Thomas, has a clearly articulated aspiration of becoming a major research institution. Although the specific criteria or requirements for promotion to higher academic ranks (teaching, research and service) have been in place for some time, there has in recent years been an increased emphasis on research. The University of Alabama is not alone in this increased focus on the quality and continuation of faculty scholarship. It appears that at the University of Alabama there is an even greater emphasis on continuing research and scholarship given to applicants for promotion to the rank of full professor, as compared with applicants for promotion to lower ranks or applicants for tenure. After all, once a faculty member is promoted to full professor, there is no sanction which the University has to enforce its requirement of continuing research productivity except raises and sabbatical leave. If the professor, as several in the Philosophy Department are shown to be, is willing to loaf and be satisfied with his salary, then there is no way to

encourage or force that professor to do scholarly research and report his findings in the scholarly literature.

These nonpublishing full professors in the Philosophy Department are pointed to by the plaintiff as one of the reasons she feels discriminated against. They are males and were promoted to full professor before Dr. Thomas arrived on the scene. They have not published for years, and apparently intend never to publish again. They have tenure and they have a full professor's rank. They seem satisfied with their salary levels, and therefore sabbatical leave is the only bit of leverage left to the University. That appears not to work either. Although they teach, they appear to be totally disinterested in research and publication effort.

The court has already commented on this to the effect that certainly the University has a right to raise its standards, provided it applies those raised standards alike to both men and women, to both blacks and whites, and equally between any competing groups.

It appears to this court that the decisions as to the three promotions this plaintiff appled for were genuine academic decisions. As the court's later discussion on the comparison between Drs. Wu and Richards will show, along with the other evidence, the plaintiff has not been discriminated against by these genuinely academic decisions. Justice Stevens recently articulated the proper relationship between the academic and judicial processes:

> When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.
>
> Considerations of profound importance counsel restrained judicial review of the substance of academic decisions. . . . Added to our concern for lack of standards is a reluctance to trench on the prerogatives of state and local educational institutions and our responsi-

> bility to safeguard their academic freedom, 'a special concern of the First Amendment.' *Keyishian v. Board of Regents,* 385 U.S. 589, 603, 17 L. Ed. 2d 629, 87 S. Ct. 675 (1967). If a 'federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies,' *Bishop v. Wood,* 426 U.S., at 349, 48 L. Ed. 2d 684, 96 S. Ct. 2074, far less is it suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions — decisions that require 'an expert evaluation or cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decision-making.' *Board of Curators, University of Missouri v. Horowitz,* 435 U.S., at 89-90, 55 L. Ed. 2d 124, 98 S. Ct 948.

Regents of the University of Michigan v. Ewing, 474 U.S. ___, 106 S. Ct. ___, 88 L. Ed. 2d 523, 532-33 (citations and footnotes omitted).

The plaintiff has issued a transparent invitation for this court to second guess the collective judgments of three different and unanimous college committees, of Dean Douglas Jones and his staff, of Vice-President Roger Sayers and his staff, and the final judgment of President Thomas. This the court declines to do.

By innuendo, the plaintiff argues that somehow Dr. Richards was duped into applying for promotion solely to create a defense to Dr. Wu's inevitable lawsuit. This is ridiculous. In the first place, Dr. Hocutt, the head of the Philosophy Department, enthusiastically recommended the promotion of Dr. Wu in 1981 and 1982, and again recommended it with somewhat less apparent surface enthusiasm in 1983. This was the same Dr. Hocutt who is accused of duping Dr. Richards into applying so that Dr. Wu could be turned down. There is absolutely no evidence of such a conspiracy in the record. The comparison between the treatment given Dr. Richards and the treatment given Dr. Wu is a perfectly fair comparison.

Dr. Wu's publication record can be divided into three primary periods of time: (1) work published or accepted for

publication prior to promotion to associate professor; (2) work published or accepted between promotion to associate professor and her first application for full professor; and (3) work published or accepted between her first application and the denial of her third promotion attempt. Her record of scholarship in these periods is as follows:

Work published or accepted for publication prior to promotion to associate professor in 1975:

(1) "Hintikka and Defensibility"
Refereed journal article

(2) "On Hintikka's Defense of (C.KK*) and (C.BB*)"
Refereed journal article

(3) "Hintikka and Defensibility: Some Further Remarks"
Refereed journal article

(4) "A New Approach to Formalization of a Logic of Knowledge and Belief"
Refereed journal article

(5) "On (C.KK*) and the KK-thesis"
Refereed journal article

(6) "Believing and Disbelieving"
Book chapter

Work published or accepted after promotion to associate professor in 1975 and prior to first application for promotion to full professor in 1981:

(1) "Natural Deduction Rules for Free Logic"
Refereed journal article

(2) "On A Tableau Rule for Identity"
Refereed journal article

(3) "On Lao Tzu's Idea of the Self"
Refereed journal article

Work published or accepted after the first application for promotion to full professor in 1981 and prior to the denial of

the third application for promotion to full professor in 1984:[1]

(1) "Three Uses of 'It' "
Paper in the proceedings of society meeting

(Defendants' Ex. 1, Résumé of Kathleen Gibbs Johnson Wu.)

It can readily be seen that there was a lessening of scholarship effort as the years went on. Dr. Wu did extraordinarily well until she was promoted to associate professor in 1975. This was on her first application for promotion. She certainly had no reason to complain of discrimination at that time. She then had three publications in the next six years. She had one publication after 1981, and that after her three applications for promotion to full professor. That publication was used three different times, but it properly should be counted as only one publication. What Dr. Wu claims as extraordinary impact on the philosophical world relates to her 1975 and earlier publications entirely. Nothing since 1975 has had any particular impact, and there have been very few publications in number. The scholarly evidence given the court indicated a high regard for what Dr. Wu published before and during 1975, and her good reputation amongst a number of internationally famed philosophers all relates to that early period of publication. She has not fulfilled her early promise. The University was right to require more scholarly research and publication before promoting her.

Although Dr. Wu has continued to assert that she has been actively working on several projects, including two books, the University of Alabama gives no credit for this type of effort until publication actually occurs, or at least there has been an acceptance for publication.

The Faculty Handbook contains a clear statement of a requirement that continued research productivity is required for promotion to full professor:

---

[1]The precise timing of the completion of "The Three Uses of 'It' " is not clear from the documentary record. At least some of its appearances, such as in the proceedings of the Society for Exact Philosophy, occurred *after* the denial of the third promotion attempt.

> Among the evidences of attainment should be recent contributions to the scholarly discipline of which the individual is a member and to the University community. An individual promoted to the rank should have a record of outstanding achievement in two or the areas of instruction, research, and service to the University and the community, a record of activity and interest in the other areas, and show evidence of continuing scholarly interest and contribution.[2]

There was no issue between the plaintiff and the University concerning the quality of her early publications. Her problem was her failure to keep going. As Dr. Meese testified,

> [w]ell, I remember at one point being worried about her evidence of outstanding teaching. I remember at another, a later time being worried about the kind of ongoing level of research production. One of the things we look at is not only the quality of the individual articles or books, but a sustained productivity over time.

(Trial testimony of Dr. Elizabeth Meese, p.18.)

The testimony of Dr. Alice Parker, a member of the College of Arts and Sciences Committee on Promotions and Tenure on Dr. Wu's second application, offers unrebutted evidence of the reasoning of that committee:

> Q. Is it fair to say that the consensus of the College Committee on which you served was not, or the decision by the College Committee, was not caused by the quality of Dr. Wu's expressed publications, but that they were somehow inadequate either in number or in recent date?
>
> A. Yes, I think that's accurate.
>
> Q. What is the significance of looking, or why would a person serving on a committee look at publications or scholarly productivity, let us say, subsequent to the last promotion?
>
> [objection overruled]

---

[2]The University of Alabama Faculty Handbook (1978 ed.), p. 31, Plaintiff's Exhibit 6.

A. Well, one of the standards for — one of the college guidelines indicate[s] that the person in order to be promoted to full professor has to show evidence of continuing scholarly activity. So it becomes very important to know what the person has done since the last promotion and what the person, whether there's evidence of continuing productivity.

Q. In other words, it's not in the best interest of the university, is it, to promote someone to the highest academic rank tenure who is not producing?

A. Right.

(Trial testimony of Dr. Alice Parker, pp.18-19.)

In a process which involves a wide variety of disciplines, each of which has its own manner in which scholarship is manifested, it is impractical to set precise, quantified measures of adequate scholarly productivity. When the qualities of intellectual merit and quantity of production are in constant interplay, it would be irresponsible folly to substitute assemby-line quotas for academic judgment. Dr. Wu's complete failure to show any significant signs of productive scholarship for a period of several years made the exercise of such judgment on her case relatively easy.

The comments of Dean Jones, when he recommended denial of Dr. Wu's promotion to full professor on the occasion of her third application, clearly state the position of the University:

> Professor Wu was promoted to the rank of associate professor in 1975. Since that year, she as published 3 additional articles. No new publications have resulted since 1981, or perhaps more significantly, in the time which has elapsed since her application for promotion last year. I recommend that promotion to professor be denied until Dr. Wu can present a fuller body of research and publication.

(College of Arts and Sciences Promotion-Recommendation Summary D's' Ex. 3.) The last publication indicated in Dr. Wu's résumé is "The Three Uses of 'It'." This publication occurred after the denial of her third application. In the

section entitled "Introduction to Supporting Documents" of Dr. Wu's third application, she describes her paper as follows:

> Since submitting my file for promotion on November 1, 1982, I have completed a paper entitled "Three Uses of 'It' ". *The Journal of Philosophy* is considering it for publication. It is also under consideration by the Program Committee for the 1983-84 Annual Meeting of the Association for Symbolic Logic. A copy of the paper is included in my file (see document No. II-56(a)).

The Journal of Philosophy rejected the article. It has never been accepted for publication in any refereed journal. It has been accepted as a paper to be delivered at two conventions and this is asserted to be the equivalent of acceptance by a refereed journal. The court will not involve itself in this controversy. It is sufficient that any such "acceptance" followed the rejection of the third application. It was not an accepted article in any sense at the time of that application. If it had been, it still represented only the production of one relatively short article of little importance in three years. The court will also not involve itself in the controversy as to whether this article is, in truth, adequate evidence of scholarly research. That is not germane to the issue before the court. The court has read it. The court does not think it compares at all with the earlier scholarly work she published before and during 1975. Her work has suffered both as to quantity and quality since 1975, according to the credible evidence in the case.

The only year to which plaintiff's Title VII claim relates is the academic year 1983-84, the year of plaintiff's third application for promotion to full professor. The other two years which have been discussed, and will continue to be discussed, do form a portion of her history, but it is only the 1984 rejection of her application which is in fact before the court.

Plaintiff attempts to argue much from the promotion files of several faculty members about whom she elicited no testimony from the witness stand. The court made it abundantly clear to counsel during the trial that if counsel

intended to prove very much from documents in the way of comparisons of treatment of various faculty, the court would expect that testimony would be offered from witnesses on such points.

One of the faculty offered by plaintiff for comparison was Dr. Claudia Johnson. In fact, Dr. Johnson did not apply in 1981-82. She had applied in 1980-81 after only four years as an associate professor. The English Department voted four to two in favor of promotion, and she received the endorsement of her department chairman, Dr. Dwight Eddins. The College Committee voted six to two to recommend deferral, and Dean Jones agreed with that recommendation. He wrote:

> I concur with the College Committee majority that the candidate's case for promotion will be enhanced by scholarship now in press or preparation. Dr. Johnson is to be encouraged; good progress is being made, but there is insufficient basis to recommend promotion after only four years in present rank.

On her next application in 1982-83, she received the strong recommendation of her department, the College Committee, and Dean Jones. The Dean wrote:

> The strong departmental and College endorsements are appropriate, in my judgment. Dr. Johnson has built an impressive dossier of scholarship, teaching and service to the institution. She has set high standards for herself and the department. I am pleased to add my strong support for her candidacy.

(College of Arts and Sciences Promotion Recommendation Summary, P's Ex. 34-7.)

The plaintiff called Dr. Johnson to the stand but elicited no evidence that Dr. Johnson felt that she had been the victim of sex discrimination. In fact, Dr. Johnson has had a distinguished and successful career as a member of the faculty and Chair of the English Department, having produced four published books in addition to a long list of other publications.

Another female faculty member offered for comparison by the plaintiff was Dr. Virginia Foscue. Dr. Foscue applied

for promotion to full professor in 1980-81, and the College Committee and the Dean recommended deferral. Her application was denied. She applied again in 1981-82, and after having received a negative recommendation from the College Committee and the Dean, she supplemented her promotion file to show the publication of a very substantial monograph. Based upon this new information, Dr. Foscue was promoted to full professor. The plaintiff, without an iota of supporting evidence, asserts that the real reason Dr. Foscue was promoted was that her ex-brother-in-law, David Vann, wrote a letter to Dr. Thomas. This is incredible. There is not a sentence of testimony from Dr. Foscue, Dr. Thomas or Dean Jones which remotely suggests such a basis for promotion. Nor has it been made clear how it would be relevant if there were such evidence.

Dr. Foscue's promotion experience illustrates very clearly that each of the various levels of recommendation in the promotion process has a genuine importance. It shows that one level does not routinely rubber stamp the recommendations of another, and that the promotion system allows full opportunity for petition, review and the receipt of new evidence. No clearer evidence of due process and fair play can be found.

The evidence thus remains that in each of the three years Dr. Wu applied for promotion, with one exception, every other woman applying for promotion to each rank within the College of Arts and Sciences was promoted. The only other woman denied promotion was an applicant for the rank of associate professor in 1983-84. That individual applied again the following year and was promoted.

The plaintiff's brief poses the question: "How were male promotional candidates faring in the same year in which Drs. Wu, Johnson and Foscue were being considered?" There was, of course, no year in which Drs. Wu, Johnson and Foscue were all being considered for promotion. In 1981-82, Dr. Wu and Dr. Foscue applied for promotion, and Dr. Foscue was promoted. In 1982-83 Dr. Wu and Dr. Johnson applied for promotion, and Dr. Johnson was promoted.

The plaintiff's brief addresses the records of several male

promotion applicants. Although the plaintiff did not elect to produce testimony at trial on some of these individuals, there is ample material in the promotion files to support the actions taken on their applications.

Dr. Norvin Richards applied for promotion to full professor in 1981 and again in 1982. As was Dr. Wu, Dr. Richards was turned down on each occasion. The departmental committee endorsed both of his applications, as did Dr. Hocutt, the departmental chairman. The College Committee recommended deferral on the first promotion attempt, and denial on the second. Dean Jones concurred with each recommendation of the College Committee. In his comments on Dr. Richards' first application, Dean Jones wrote:

> I have no basis to overrule the recommendation of the College Committee. Dr. Richards' teaching and service records are very good. Comments on his teaching suggest that he is extremely successful with difficult material. Peer evaluations suggest that the candidate's current work in moral theory is particularly valuable. At present, he shows only a few articles since his last promotion. I believe a stronger case for promotion to full professor can be made when some of this new research is published. Dr. Richards should be encouraged to continue his good efforts to complete research in progress. He is a valuable member of this faculty.

(College of Arts and Sciences Promotion Recommendation Summary, P's Ex. 34-6.) In support of Dr. Richards' application, Dr. Hocutt had written: "All evidence indicates that Dr. Richards is the best teacher in the department and one of the best in the university." (P's Ex. 34-6.)

In recommending denial of Dr. Richards' second application, Dean Jones wrote: "However, I recommended last year that promotion be deferred until research in progress was accepted for publication, having been subject to peer review. Under these circumstances, I must recommend once again that action be deferred." (College of Arts and Sciences Promotion Recommendation Summary, P's Ex. 34-7.) Once again, in spite of the strong endorsements of his de-

partmental committee and Dr. Hocutt, Dr. Richards was denied promotion to full professor.

The relevance of Dr. Richards' experience to this case is compelling. It demonstrates that the individuals and committees involved in making promotion decisions at the University were applying precisely the same reasoning to men and women applicants. The unanswered testimony at trial showed that Dr. Richards was in fact more qualified for promotion to full professor than Dr. Wu. Both Dr. Hocutt and Dr. Meese testified that they felt Norvin Richards more nearly satisfied the requirements for becoming a full professor. Dr. Meese based her judgment primarily on the fact that although it had not been accepted for publication, Dr. Richards' book manuscript had been completed.

The primary difference between the experiences of Dr. Wu and Dr. Richards is that Richards, knowing he had not fulfilled the expectations of the College Committee and the Dean, elected not to reapply the following year. Dr. Wu, in spite of an unbroken lull of published scholarship, reapplied at the next opportunity. It might also be noted that Dr. Richards received one affirmative vote on the College Committee on his second application. Each of Dr. Wu's three attempts were met with a unanimously negative College Committee.

Dr. Richard Krause, was also argued by the plaintiff to have been promoted, as opposed to her failure to be promoted, for purely discriminatory reasons. Dr. Krause, an anthropologist, applied for promotion to full professor in 1980-81. He received the endorsement of his department. He was serving as chairman of the anthropology department. He had held the rank of associate professor since 1970. The College Committee voted five to three to recommend deferral. Dean Jones recommended promotion. Dean Jones noted particularly that Dr. Krause achieved his fine research record in spite of his difficult teaching load and his service to the University as Chairman of the Department of Anthropology. The departmental committee reported that:

Krause has consistently carried one of the heaviest teaching loads of the entire faculty. In addition to courses in Anthropology, he has frequently taught in New College and in the Honors Program. Although course evaluations could not be found for the semester in which information was returned, a very eloquent appraisal of Krause's teaching ability is indicated by the number of students who come back to take additional courses with him and who persuade their friends to settle for "no one but Krause" for introductory anthropology. All who have knowledge of his teaching agree that Krause is a superior teacher.

In addition to the regularly scheduled classes, Dr. Krause has designed a certificate program in archeology for the general public. This has been sorely needed by the state of Alabama in the interests of protecting the state's archeological heritage through education. . . .

Krause has gladly provided guest lectures when invited both within the University community and without. The papers in file illustrate some of the diverse groups to whom he has lectured. His continued invitations clearly indicate his ability as a lecturer and teacher.

Because of the continuing demands of this post, in addition to his heavy teaching load, research has been difficult for Dr. Krause during his term as Department Chairman. However, he has managed to produce several fine pieces of work since 1974. His publication record is exemplary for the field. . . . This extensive field experience not only has resulted in a number of publications, but has also prepared him for supervision of the field school in archeology which he did for several summer terms.

(College of Arts and Sciences Promotion Recommendation Summary, P's Ex. 34-5.)

The Anthropology Department, like the Philosophy Department, is small and requires outside faculty to sit on promotion committees. In the case of Dr. Krause, one of the members of his departmental committee was Dr. James Clark of the Philosophy Department. As Dean Jones' comments make clear, even with his vastly superior teaching and

service records, Dr. Krause's publication record is considerably better than Dr. Wu's:

> Dr. Krause is well known in his field, has published one monograph and has another accepted for publication; he has published about a dozen papers with 3 in preparation. I've urged him to apply for sabbatical to complete the research on several other projects.

Id.

Another male faculty member offered for comparison with the plaintiff was Dr. Burke Ritchie. Dr. Ritchie, a chemist, applied for promotion to full professor in 1980-81 and was promoted that year. The plaintiff's brief incorrectly attributes a comment of the College Committee to Dean Jones. The College Committee recommended promotion five to three, and the Dean joined that recommendation. In support of Dr. Ritchie's promotion, Dean Jones wrote:

> I am recommending this action for several reasons: first, the candidate has an impressive record of *individual* scholarly achievement, a fairly rare situation in his field. Second, Dr. Ritchie has written well received grant proposals which funding was inadequate to implement; his area of theoretical research is not blessed with high levels of federal support. Thirdly, Ritchie's students have done well, attesting to his attention to their academic preparation. External reviews are uniformly excellent, attesting to his national and international reputation.

(College of Arts and Sciences Promotion Recommendation Summary, P's Ex. 34-5.)

Neither Dr. Ritchie nor Dr. Krause was an applicant for promotion in any of the years Dr. Wu applied. They were both promoted in the 1980-81 process. The record is clear that both Drs. Ritchie and Krause were better qualified for promotion than Dr. Wu.

Another such male faculty member offered for comparison by plaintiff was Dr. David Weaver. Dr. Weaver is another applicant about whom the plaintiff elicited no testimony at trial. He is a geographer. He applied for and was promoted

to the rank of full professor in 1981-82. The plaintiff's brief states, on page 15: "The standard to which the plaintiff was held certainly did not apply to Dr. Weaver." At the time of his application, Dr. Weaver's record of scholarship included two books, five monographs, eleven articles, three map series, three editorships, three project reports, four book reviews, and twelve abstracts of papers. In addition, he had nine research grants with a total value of over $290,000. Importantly, Dr. Weaver's work showed a continuous and significant scholarly output.

Dr. Weaver's department chairman wrote, in endorsing his promotion:

> David Weaver is, without doubt, the best all-around academician in the Department of Geography. His teaching marks are excellent, his grantsmanship has been the best in both Geology and Geography, his research has been very strong, and his service has been far beyond what was expected of him.

(College of Arts and Sciences Promotion Recommendation Summary, P's Ex. 34-6.) The departmental committee report found that Dr. Weaver's teaching evaluations had been "outstanding." The difference in the quality of Dr. Weaver's teaching and service and that of Dr. Wu is clear from the record. His scholarship far exceeds anything she had done, then or now.

Dr. Robert Bell was also offered for comparison by the plaintiff. Dr. Bell, in the German and Russian Department, is another individual about whom the plaintiff elicited no testimony at trial. He applied for and was granted promotion to the rank of full professor in the 1981-82 process. Dean Jones recommended promotion even though the College Committee had recommended deferral. Dr. Bell's teaching and service records were obviously superior to Dr. Wu's. As in the case of Drs. Krause, Ritchie and Weaver, Dr. Bell's scholarship, both in terms of quantity and regularity of production, was superior to that of Dr. Wu. Dean Jones wrote, in support of Dr. Bell's promotion:

> The candidate has been a steady, productive scholar in his field, as attested to by internal and external evaluators. He has represented us well in the broader professional world of his discipline. Based on peer testimonials and student evaluations, Dr. Bell is a conscientious teacher who earns high grades from his classes. Even though I would prefer to have available reviews of the forthcoming book by the UA Press before making this recommendation, I consider the case stronger than "deferral" and recommend promotion.

(College of Arts and Sciences Promotion Recommendation Summary, P's Ex. 34-6.)

The plaintiff apparently sees some invidious inference in the fact that Dean Jones disagreed with the deferral recommendation of the College Committee. The case of Dr. Bell, just as that of Dr. Foscue, demonstrates the independence and importance of several layers of recommendation and review. It shows absolutely nothing about sex discrimination.

Another such faculty member offered for comparison was Dr. Peter Casazza. The plaintiff apparently sees a nefarious force at work in the promotion of Dr. Casazza, a mathematician. Her argument is based on the fact that Dean Jones recommended promotion, even though the departmental and College Committees recommended deferral. The basis for the deferral recommendations was that Dr. Casazza had only been on the faculty of the University for one year. There was a consensus that his teaching and service were excellent, and that he had been very successful in obtaining grant support for his research. Dr. Casazza's department chair, Dr. Hobby, enthusiastically recommended promotion. He wrote:

> Casazza's research record is extremely impressive. He has done considerably more than the minimum required by our promotion standards. . . .
>
> Casazza's productivity is astonishing. His research is very deep, virtually every paper giving a definitive treatment of a major problem. He has shown the ability to enter a completely new field, teach himself the necessary background material and settle one of the big

> open questions. . . . He has been supported by the National Academy of Sciences for an extended trip to Russia and Eastern Europe. He has what amounts to an open invitation to travel to the most prestigious conferences/universities (at their expense) to talk about forthcoming work. . . .
>
> If this were all he had accomplished in 9 years, it would be outstanding. But look at what else he has done. He took over as chairman at UAH when he was an untenured assistant professor; he continued his research program, received fantastic teacher ratings, spoke, and contributed 11 expository articles (quite separate from his research program) to the service oriented Alabama Journal of Mathematics. He has served as Problem Editor of the Journal for the past 2 years. . . .
>
> He was completely qualified to be a full professor when we hired him beginning 1980-81. . . .
>
> Casazza is the best thing that has happened to our department in years. He may well have done more to buy us international prominence than the whole of the rest of us. His teaching is great. His service is fantastic. He has been an associate professor in the U of A system for more than 5 years, so we are not talking about early promotion. He obviously deserves promotion.

(College of Arts and Sciences Promotion Recommendation Summary, P's Ex. 34-6.) Dean Jones agreed with the recommendation of the department chair, and recommended promotion. It was clear that the primary reservation of the departmental committee was the relatively short time Dr. Casazza had been on the faculty. Dean Jones exercised the independent judgment the right to use of which comes with his job. It is good to remember that in 1975 the faculty of the Department of Philosophy also recommended deferral of the promotion of Dr. Kathleen Wu to associate professor, on the grounds that she had not been on the faculty long enough. In the case of Dr. Wu, Dean Jones also differed with the opinion of the department, and recommended promotion to associate professor. If Dean Jones has been discriminating against Dr. Wu, his discriminatory attitude began sometime between 1975 and 1981. There has been not

one scrap of evidence to support any theory that this high opinion of her in 1975 was changed by reason of any discriminatory animus or motivation whatever. The record clearly discloses to this court that he has been excercising independent judgment at all times in an unbiased manner.

The plaintiff also offers Dr. Howard Miller for comparison. Nowhere is she more decidedly off base. Dean Jones was questioned at some length about his recommendation of promotion for Dr. Miller. It was Dr. Miller who began an exploration of the relationship between the fields of public health and psychology.

Dr. Miller received the endorsement of his department, his department chair and three members of the College Committee. In recommending promotion, Dean Jones wrote:

> His colleagues in the department stress the importance of his teaching and service and research publications in the last two years. . . .
>
> There was departmental concern in the past about the quality of the candidate's published research; it is obvious from the nature of the current recommendations that they consider publications in *American Psychologist* (4 articles published or in press now) to be clear evidence of the quality and acceptance of his work. I have made comments on the CV to reflect the nature of acceptances, etc. since the document was prepared last fall. The comments from external reviewers were made prior to the addition of a significant number of publications in Dr. Miller's bibliography. Since the College committee reviewed the folder, I have determined that two articles listed as "submitted" have been accepted pending minor revisions.
>
> It is clear that the candidate's research interests are in psychology and public health, an area in which he has achieved national recognition. . . .
>
> As regards teaching, a review of attached student evaluations over the past three years indicate [sic] the candidate's teaching to be above average, particularly at the advanced level. Dr. Fowler concludes that "his teaching, while variable at the undergraduate level, is

> remarkably good at the graduate level which is his primary responsibility."
>
> The candidate's service accomplishments are very strong from all reports. He has completed a master of public health at UAB, representing a real commitment on his part to prepare himself to work effectively in an area he considers to be a significant new area in psychology. He has served as consultant to public health programs around the country, as attested to by at least one outside evaluator.
>
> In my judgment, the candidate meets the requirements for promotion to professor. The fact that his research is now being published in the profession's top journal is significant to me. Apparently he is very effective with graduate students in the department as well. I recommend that he be promoted to the rank of professor.

(College of Arts and Sciences Promotion Recommendation Summary, P's Ex. 34-7.)

The plaintiff asserts in her post-trial brief that: "Miller was promoted saying he now had *four* articles published or in press now. . . . Dr. Wu had met the standard of four publications when she was promoted to the rank of Associate Professor." The record is clear that it was Dr. Miller's *recent and continuing scholarship,* represented by new work, including four articles in *American Psychologist,* the most prestigious journal in his discipline, which convinced Dean Jones of the merit of his research. His total scholarship is far greater. As Dr. Fowler, chair of the Psychology Department wrote:

> With regard to publications, Dr. Miller has shown, in the words of one committee member, "an extraordinary burst of productive professional and scholarly activity in the last couple of years that has thrust him into the vanguard of Psychology of Public Health. His publications (4) in the most prestigious journal in psychology *(The American Psychologist)* are more than almost every psychologist in the country has in a lifetime." I agree. The rejection rate in *The American Psychologist* must approximate *90%.* Dr. Miller's articles were accepted immediately, in one case by a telephone call from the

> executive editor. All were published in minimum time although the journal has an unusually long publication lag. As co-author with Dr. Miller on one of the articles, I was impressed not only with his knowledge but with his incisive writing style. As senior author, he took primary responsibility for the organization of the article. It has been widely requested, and has had, I believe, some impact on the field already.

(College of Arts and Sciences Promotion Recommendation Summary, P's Ex. 34-7.)

The plaintiff also offered for comparison Dr. Richard Baldes. The College Committee recommended promotion for Dr. Baldes, from the Department of Romance Languages and Classics, by a vote of six to two. The departmental committee had recommended negatively, and the department chair recommended promotion. Dean Jones also recommended promotion. In stating the bases of his recommendation, Dean Jones wrote:

> Both departmental and college committees determined the candidate's teaching and service to be very strong and that his record of scholarship is impressive. The departmental committee, by unanimous vote, expressed the opinion that the published work is limited in scope and has appeared in only a limited number of periodicals. The College committee concludes that the candidate has placed his publications well.
>
> I'm impressed with the strength of Dr. Glenn's support of promotion. Dr. Baldes has received two NEH summer research fellowships which is not an insignificant recognition of the quality of his scholarship. I consider teaching and service of high quality and scholarship at least adequate for promotion to full professor and recommend that this action be taken.

(College of Arts and Sciences Promotion Recommendation Summary, P's Ex. 34-7.)

While maintaining an overload teaching schedule, without the release time for research customarily granted to Dr. Wu, Dr. Blades kept up his research productivity and compiled a record of excellent service to the institution. Although his

publication record was not as strong as that of Dr. Miller and the other promotees, Dr. Baldes was able to satisfy each of the three aspects of promotion: teaching, research and service. The principal fact which distinguishes his record from that of the others discussed herein, is that he made a significant and impressive contribution to the teaching load of his department far in excess of anything routinely expected of other faculty, including Dr. Wu.

Plaintiff's brief makes no mention of the promotional comparison between Dr. William Doty, of the Department of Religious Studies, and Dr. Wu. At trial the plaintiff sought to explore this particular comparison. In fact, as the court noted, the Department of Religious Studies, having at one time been joined with the Philosophy Department, provides the next closest discipline to philosophy with which to make a comparative analysis.

Due to the similarity of the disciplines, after Dr. Norvin Richards, Dr. William Doty is the most appropriate male with whom to compare Dr. Wu. Prior to promotion to full professor Dr. Doty published five books, was in the process of writing four more books, published over thirty articles, essays and monographs, and published more than fifty book reviews. Dr. Doty published a great deal of work between the time he came to the University in January 1980 and his promotion to full professor in 1983.

Even with his massive contributions to the scholarship of his field, Dr. Doty's promotion application did not have absolutely smooth sailing. Dean Jones asked the Office of Academic Affairs to reconsider its original negative recommendation on Dr. Doty's promotion. Once the magnitude of Dr. Doty's scholarly contributions became clear in the record, he was promoted.

Each of the individuals to whom the plaintiff compared herself at trial and in her brief was manifestly more qualified for promotion than she. The documentary record is clear even for those individuals about whom there was no testimony at trial. Each of the promotion decisions identified by the plaintiff is consistent with the standards and requirements of The University of Alabama. There is no evidence

whatsoever of any difference in policies or standards applied to men and to women. Men and women who met the standards for promotion were promoted. Those that did not were not promoted. Dr. Wu cannot make a credible argument that her record of scholarship, teaching and service is fairly comparable to the records of the distinguished members of the faculty discussed above.

The plaintiff also contends that there was discrimination against her with regard to her rate of pay and that this is evidence of sexual discrimination which she has suffered. Dr. Wu testified that she thought she should make more than Dr. Clark and Dr. McMinn, and at least as much (and presumably more) than Dr. Richards. She testified that, although she made more than Dr. Hestevold, she didn't make "enough more." She argues that her original salary (agreed to in the spring of 1972) was too low, and that her incremental raises along the way have been inadequate. None of her complaints has any basis in fact.

Although well beyond any applicable statute of limitations for either the Equal Pay Act of Title VII, Dr. Wu's original salary was perfectly consistent with her skill and experience at the time she was hired. Her starting salary (set during March 1972) was $10,500 for a nine-month teaching assignment. At the time she was hired, her post-graduate teaching experience was limited to teaching a three-hour undergraduate course in general philosophy at Suffolk University in Boston. She filled in for a faculty member on leave for one semester. Other than that, she had only the experience of a teaching assistant during her graduate work at Yale. Essentially, she had almost no prior experience in the classroom.

When the $10,500 commitment was made to Dr. Wu, Dr. Norvin Richards was completing his second year of full-time work as an assistant professor at the University. Prior to coming to this University, Dr. Richards had substantial experience in the external teaching processes of the University of Virginia. He too had experience as a graduate teaching assistant, but his prior work included actual responsibility for teaching entire classes. Dr. Richards' nine-month salary for the academic year 1971-72 was $10,700. He had

been hired the previous year at the rate of $10,200. Starting in the fall semester of 1972, Dr. Wu's salary was $10,500 and Dr. Richards' was $11,350. The difference of $850 is amply justified by the difference in their teaching experience. At this same time, Dr. McMinn, as associate professor with much more substantial teaching experience was paid at a nine-month rate of $13,800.

The plaintiff's arguments on the relationship between her employment conditions and those of her husband, Dr. H. K. Wu, are curious. On the one hand she argues that she must have been hired as part of a "package deal," and that she would not have gotten the job absent the University's eagerness to hire her husband. At the same time she contends that she was paid less because her husband was paid so well. Each contention is without merit. Given the prevailing rate of pay in the Philosophy Department, as shown in the salary of Dr. Richards, it is clear that Dr. Wu was treated exactly as anyone else would have been. Her "package deal" argument can best be answered by her own testimony at trial. Since her marriage, the geography of her employment has been largely dictated by that of her husband. When he was teaching in Boston, she limited her job search to the Boston area. When he was offered a job in Alabama, her work had to follow. In her brief (page 5) the plaintiff writes: "Because there appeared to be excellent career opportunities for both of them at the University, H. K. Wu indicated that he would consider the University if the University would consider Kathleen." It was not a violation of Dr. Kathleen Wu's rights for the University to hire her, at a rate consistent with her experience and the salaries of others in the Philosophy Department.

In her brief the plaintiff argues that some invidious process was at work in the manner in which her job was originially filled and funded at the University. She argues, at page 5, that "[w]hen Dr. Wu applied in 1972 to join the Philosophy faculty, the University had a full-time vacancy since one of its regular faculty members was taking leave." The fact that a member of the department (in this case Dr. Jenkins, the chairman) was "taking leave" does not create a

vacancy; he was expected to return. Indeed, he did return. What then would have been the status of the "vacancy" which Dr. Wu had filled? The relevance of her argument on this point is elusive, but her contention that there was a vacancy available for her is simply based on a misunderstanding. In fact, the University actually created a faculty position for Dr. Wu.

In spite of the appropriate relationship between Dr. Wu's starting salary and Dr. Richards' salary, the plaintiff's brief contends that she was the victim of an historic "pecking order" pay policy of the University. This "pecking order" was supposed to have differentiated in salary on the basis of sex and marital status. Indeed, it was supposed to be sophisticated enough even to account for the place of employment of the spouse. The evidence introduced on this issue at trial by the plaintiff consisted of Dr. James Clark's recollection of conversations he had with the late Dean Martin ten Hoor on the subject of faculty salaries.

Since Dr. ten Hoor died years before Dr. Wu was hired, and long before either Title VII or the Equal Pay Act applied to the University, the value of her case of his reported observations is questionable. Obviously, he did not have her situation in mind. Dr. Clark's recounting of his discussions with Dean ten Hoor did not remotely approach the level of being relevant evidence in a case arising many years later. There was no showing that the pay disparities apparently noted by the Dean were within the same discipline or within similar colleges; there was no showing of the role that relative seniority may have played in the wage process; there was no analysis of scholarly productivity which may have varied in the couples with which the Dean was familiar. In short, none of the necessary ingredients for an appropriate sex/wage comparison was present.

In many respects the contemporary salary analysis conducted by Dr. Ignatin, the plaintiff's economist, suffers from the same defects as Dean ten Hoor's observations. Dr. Ignatin's calculations did not include any accounting for seniority, rank, years in rank, teaching ability, production of scholarship, service to the institution, or any other factor

which might have affected salary. Particularly important is Dr. Ignatin's failure to consider the year-to-year variability in the amount of funds available for faculty raises. Title VII and Equal Pay Act law is abundant and clear that attempts to show improper wage-setting must account, by appropriate regression analyses, for the variety of legitimate, non-discriminatory factors which affect wage rates. Dr. Ignatin made no pretense of considering any of these factors. In affirming the dismissal of a Title VII and Equal Pay Act Claim brought by women faculty of the University of Washington, the Ninth Circuit wrote:

> Further, the statistical evidence submitted by the nursing faculty was deficient in several respects. It did not adequately account for prior job experience, rank, or multiple degrees, and, most important, it did not adequately evaluate the actual work performed by various faculty members.

Spaulding v. University of Washington, 740 F.2d 686, 698 (9th Cir. 1984), *cert. denied,* 469 U.S. ___, 105 S. Ct. 511, 83 L. Ed. 2d 401 (1984).

In *Coser v. Moore,* 739 F.2d 746 (2d Cir. 1984), the Second Circuit found similar inadequacies in salary analyses which did not account for the variety of factors which might influence wage rates. It held:

> Plaintiffs' statistical studies in support of their claims of salary discrimination against women NTP's purported to show that men were paid more than women within each NTP rank. Judge Pratt concluded, however, that plaintiffs' studies were both "unrealistic and illogical" because they took no account of either prior work experience or existing duties at Stony Brook. 587 F. Supp. At 603. He concluded that plaintiffs' regression analyses could not realistically predict salaries or establish proof of salary discrimination among NTP's unless such variables are taken into account. We agree.

Coser, at 753.

The plaintiff's citations to the "Report of the Salary Committee — October 1985" are profoundly misleading. At

trial, plaintiff attempted to introduce a one or two page portion of an early draft of the report. At the insistence of the defendants and the court, the entire final report was introduced as Plaintiff's Exhibit 45. The following is taken from pages 14 and 15 of that report:

> Between 1979 and 1985 the annual percentage salary increase of male and female faculty members varied by 0.6 percent or less. During these four years, the average increase for females was slightly greater than that for males. The range was from −0.5 percent to +0.6 percent.
>
> Of 159 female faculty members in 1984-85, 35 percent were concentrated in Nursing and Home Economics, the only University of Alabama divisions with a majority of women faculty. In the divisional salary rankings shown in Table 5, it can be seen that these two divisions also had the lowest salary rankings within the University and fell −6.2 percent and −3.5 percent, respectively, below SUG averages.
>
> Tables 6 and 7 show average salaries and percentage differences for men and women in the various divisions of the University for 1983-84 and 1984-85. Although males employed in disciplines, such as Home Economics and Social Work, that have a larger percentage of female than male faculty frequently are paid disproportionately more than females in the discipline, this does not appear to be the case at The University of Alabama. Within the College of Arts and Sciences, differences between the 1984-85 salaries of males and females in the same rank and department varied from −11.3 percent to +1.8 percent; in the College of Commerce and Business Administration, the differences varied from −1.8 percent to +3.3 percent. For the faculty as a whole, the differences between male and female salaries at the professor (−11.3 percent), associate professor (−3.4 percent), assistant professor (−7.3 percent), and instructor (+4.3 percent) ranks appear to be within limits that could have been caused by the small number of women represented and by the disproportionate number of women who are in University of Alabama divisions with lower average salaries.

In all respects the findings of the University Salary Committee are a more reliable guide to present-day wage reality at the University than are the reported observations of Dean ten Hoor or the deficient analysis of Dr. Ignatin.

Few issues at the University are subjected to as intense a review as is the relationship between male and female faculty members' salaries. As Dr. Meese testified, every level of academic governance, from the department to the college to the Office of Academic Affairs, regularly and strictly reviews salary equity. These salary equity and affirmative action procedures are of direct relevance to this case. As the Second Circuit recently wrote, in upholding a judgment in favor of the State University of New York:

> It should be emphasized that the finding that Stony Brook has an effective affirmative action program is of central importance to this litigation. The existence of a comprehensive affirmative action program is the antithesis of a pattern and practice of discrimination based on sex. Such a program is evidence of an intent to eliminate gender as an employment criteria and to root out subtle forms of discrimination. It thus directly controverts a claim that discrimnation is the "standard operating procedure." *Teamsters,* 431 U.S. at 336, 97 S. Ct. at 1855.

Coser, 739 F.2d at 751.

Both as Assistant Dean of the College of Arts and Sciences, and as affirmative action officer of the college, Dr. Meese reviewed the salaries and raise recommendations for Dr. Wu, Dr. Richards, and other male and female faculty in the college. Dr. Meese testified that because of the University's emphasis on rewarding faculty merit in establishing salaries, she compared the recommended salary with the relevant faculty activity reports. Testifying that she made such an analysis of the wage differential between Dr. Wu and Dr. Richards at least in 1983-84 and 1984-85, Dr. Meese said:

> Q. And on those occasions when you investigated the pay differential and the raise differential for Dr. Richards and Dr. Wu, what did you determine?

A. I was satisfied that the differential was justified.
Q. On what basis?
A. On the basis of research productivity and also time at the institution.

(Trial testimony of Dr. Elizabeth Meese, p. 12.)

As part of the two departmental reviews of the chairmanship of Dr. Hocutt, Dr. Ronald Rogers of the Phychology Department also conducted a thorough statistical review of the appropriateness of Dr. Hocutt's raise recommendations. Dr. Rogers determined the correlation coefficient between Dr. Hocutt's raise recommendation and each of three factors: teacher/student evaluations, published scholarship, and presentation of papers. For each aspect of faculty activity, and for each member of the faculty of the Philosophy Department, Dr. Rogers found an extraordinarily high correlation. In further defense of the salary differential between Dr. Wu and Dr. Richards, the wage history of each, along with their scholarly performance was thoroughly reviewed by Dr. Nancy Simco, of Memphis State University. As had Dr. Meese and Dr. Rogers, Dr. Simco found the salaries to be perfectly appropriate. Dr. Simco brought to the witness stand not only an expertise in philosophy, but years of experience as an institutional administrator and as the editor of a respected philosophical journal.

The most direct evidence in support of the pay differential among the various members of the Philosophy Department is their own work, and their own testimony. The court had the opportunity to hear directly from each member of the department, on their backgrounds, their work, and their aspirations. The differences in the energy, productivity, and contribution to the institution displayed by Dr. Richards and Dr. Wu are apparent. Dr. Richards has been a better teacher, has had far greater job duties as a two-time acting chairman of the department, has taught many more classes and students (see Defendants' Exhibit 12), has been singled out repeatedly for participation in the Honors Program, and has now, it can be argued, produced a significantly more important body of scholarship than has Dr. Wu.

The plaintiff attempts to make some point out of the fact that Dr. Richards' salary now exceeds that of Dr. McMinn and Dr. Clark. The testimony of Dr. Meese illustrates how this circumstance develops. While rank is a factor in salary, the salary increments awarded in a system which is based on individual merit will inevitably cause an overlap between the salaries of meritorious, but lower ranking, faculty members and senior faculty who have stopped contributing to their fields. This process has nothing to do with gender. In fact, Dr. Meese testified that, as an associate professor, she makes considerably more than some full professors in the English Department. Just as Dr. Richards has overtaken two full professors, so is Dr. Wu on that same course. Her salary increases have been substantially higher than those of Dr. Clark and Dr. McMinn, and soon she too will surpass them if this trend continues.

Dr. Wu also complains that she "does not make enough more" than Dr. Hestevold. This complaint is not within the purview of either Title VII or the Equal Pay Act, but if it were, there are some very good reasons for Dr. Hestevold's salary being what it is. At the time he was hired Dr. Hestevold was selected from over a hundred applicants. This gives some indication of the change in market conditions in recent years. Dr. Hestevold in his relatively short time at the University has published a considerable amount of work during the period of Dr. Wu's inactivity. Dr. Hestevold's student evaluations are far superior to those of Dr. Wu. His services to the institution also exceed hers.

With respect to plaintiff's fourteenth amendment contentions, a prospective promotion, just as a raise in pay, is neither a property nor a liberty interest protected by the fourteenth amendment. As a result, the plaintiff has suffered no injury for which relief is available under 42 U.S.C. § 1983, nor on any direct action theory under the fourteenth amendment itself. *Board of Regents of State Colleges v. Roth,* 408 U.S. 564 (1972); *Doyle v. The University of Alabama in Birmingham,* 680 F.2d 1323 (11th Cir. 1982); *Bigby v. City of Chicago,* 766 F.2d 1053 (7th Cir. 1985), *cert. denied,* 106 S. Ct. 793

(U.S. Jan. 13, 1986). *See also, Webster v. Redmond,* 599 F.2d 793 (7th Cir. 1979, *cert. denied,* 444 U.S. 1039 (1980).

Dr. Wu has the burden of proving that she was the victim of deliberate, intentional sex discrimination. She has made no allegations nor introduced any evidence in support of a disparate impact theory of recovery. Under the precedent of *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), and *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981), the stages of the plaintiff's proof are clear. To make her prima facie case of employment discrimination she must prove: (1) she was a member of a protected class, (2) she applied for the promotion, (3) she was qualified, and (4) an equally or less qualified male was promoted. She was not qualified. No equally or less qualified male was promoted within the relevant time frame.

Even had Dr. Wu been able to make out the necessary elements of a prima facie case, the University is obligated only to articulate a legitimate, nondiscriminatory reason for its decision. In the case of Dr. Wu, the University did far more than articulate such a reason. Witness after witness, document after document, showed that Dr. Wu simply did not meet the qualifications for promotion. The reasons given by the University are clear and well documented. They reflect policies that were applied fairly and consistently to all faculty, male and female alike.

When met with such legitimate, nondiscriminatory explanations from the employer, the plaintiff's burden is to prove that these explanations are in fact only pretexts for sex discrimination. Confronted by this burden, the plaintiff offers a bizarre accusation: "Reasonable minds are driven to the conclusion that Richards merely served to block the plaintiff's promotion although he suffered no actual losses as a result of the denials." (Plaintiff's brief, page 43). There is no evidence whatever of such a plot. Surely the plaintiff does not seriously ask this court to believe that Dr. Richards' applications for promotion were solicited by the University, whose officials knew ahead of time that Richards would be denied promotion, solely for the purpose of establishing a defense to the inevitable lawsuit of Kathleen Wu? The

evidence clearly showed, without contradiction, that the only University official who solicited Richards to apply was Dr. Hocutt, the head of the Philosophy Department. This was in 1981. At that time Dr. Hocutt was enthusiastically in favor of the promotion of Dr. Wu and did everything in his power to bring it about. He thought Dr. Wu was going to be promoted, and he thought Dr. Richards was equally deserving. It is paranoid to read into these facts a plot to avoid promoting Wu by soliciting the application of Richards so that both could be refused and the refusal of Richards could be used as proof of equal treatment of Wu. Hocutt was trying hard to treat them equally by getting them both promoted. He did not fall out with Dr. Wu for three years after the first application of hers for the promotion in question. This argument smacks of desperation.

Certainly, if there were anything to the argument, the court would be entitled to an explanation how the University managed to orchestrate a massive conspiracy involving three different divisional committees, each with female representation, all three of which committees were unanimously opposed to her promotion. On three separate occasions the Assistant Dean of Arts and Sciences, the Dean of Arts and Sciences, the Vice-President of Academic Affairs, and the President, were uniform in their conclusion that Dr. Wu was unqualified for promotion. All these people would have had to have been involved in the same conspiracy, and it is beyond question that in an academic community like the one at The University of Alabama, had such a plot existed, because of the very large number of people involved, it certainly would have become known, or at least rumors would have flown about its existence. This theory insults the integrity of a large number of honest, capable, dedicated faculty. It is beyond belief, and the court does not credit it.

The plaintiff has come nowhere nearly close enough to proving pretext on the part of the University in the reasons given by the University for its denial of her three promotion requests. There being no real evidence in support of pretext, the court sees no need to discuss the issue further. There certainly was no evidence that the three divisional commit-

tees were composed of professors who were prejudiced against women. All three of these committees had female members, and every member of every committee voted to deny Dr. Wu's promotion. The University administration certainly had a right to accept these recommendations from these three committees.

There has been massive discovery in this case, including lengthy depositions of witnesses and a huge number of documents. The case has been ably prepared by counsel for the plaintiff. There has been no pebble which counsel failed to overturn to see what was beneath. The evidence of pretext is simply not there.

The court has come to the conclusion that Dr. Wu certainly is an able philosopher. She has great intellectual capacity. However, between 1981 and 1984 she did not publish, and she was not entitled to be promoted to the rank of full professor at the time of her three applications.

A separate order consistent with this memorandum opinion will be entered.

DONE this the 23rd day of October 1986.

/s/ J. Foy Guin, Jr.

UNITED STATES DISTRICT JUDGE
J. FOY GUIN, JR.

EXCERPTS FROM FACULTY HANDBOOK (PL. EX. 6)

4. DIVISIONS OF THE UNIVERSITY

A. College of Arts and Sciences

The College prepares students in the humanities, the natural sciences and the social sciences, and provides basic liberal arts education for all other University divisions. The College also offers preprofessional programs designed to prepare students for professional training in the health-related fields, in law, and in other professional areas. It offers programs of instruction in the following specific areas: American Studies, Anthropology, Art, Astronomy, Biochemistry, Biology, Chemistry, Classical Languages, Classics, Comparative Literature, Communicative Disorders, Earth Science, Economics, Environmental Studies, English, French, General Studies, Geography, Geology, German, Greek, History, Honors, International Studies, Italian, Latin, Latin American Studies, Mathematics, Microbiology, Music, Philosophy, Physical Therapy, Physics, Political Science, Portuguese, Psychology, Religious Studies, Russian, Russian and East European Studies, Sociology, Spanish, Speech, and Women Studies. Undergraduate degrees offered within the College include: Bachelor of Arts, Bachelor of Science, Bachelor of Fine Arts, Bachelor of Music and the Bachelor of Science in Chemistry, Microbiology, and Geology. Certificate programs are available in Latin American Studies and Urban Planning. Graduate instruction is offered leading to the Master of Arts, Master of Science, Master of Fine Arts, Master of Public Administration, Master of Music, Educational Specialist and Doctor of Philosophy degrees through the Graduate School.

B. College of Commerce and Business Administration

The College prepares students for professional careers in both profit and not-for-profit organizations. Program administrative areas within the College in which instructional programs are offered are: Accounting and Information Systems; Economics, Finance, and Business Law; Interdis-

ciplinary Programs (including General Business Administration, Statistics, and Management Science); Management and Marketing, and Business Administration. At the undergraduate level, the College offers the Bachelor of Science in Commerce. Through the Graduate School and the Graduate School of Business, the College offers instruction leading to the following degrees: Master of Science in Commerce (with a major field); Master of Arts (with a major field); Master of Business Administration; the Educational Specialist in Business Administration; and the Doctor of Philosophy in Business Administration.

C. College of Community Health Sciences

The College was established to help the State of Alabama meet pressing health care delivery needs as mandated by the State Legislature in 1971. The program operates in partnership with and draws on resources of The University of Alabama in Birmingham. It provides clinical training for medical students and postgraduate students (interns and residents) for the primary health specialities (i.e., family practice, internal medicine, pediatrics, obstetrics and gynecology, and psychiatry). As resources permit, it is responsible for new programs in the allied health fields and assists in coordinating the existing allied health programs of the University.

D. College of Education

The College prepares students for careers in teacher education and related professional fields. Programs include teaching fields for Elementary and Secondary Education; Educational Administration, Planning and Higher Education; Supervision and Curriculum Development; Counseling and Guidance; Educational Psychology; Fine Arts Education, Health, Physical Education and Recreation; History, Philosophy and Sociology of Education; Office Administration; and Special Education. Degrees offered by the College are the Bachelor of Science in Teacher Education and the Bachelor of Science in Education (non-teacher certification programs). Curricula are offered leading to the Master of

Arts, the Educational Specialist, the Doctor of Education, and the Doctor of Philosophy.

E. College of Engineering

The University of Alabama College of Engineering is the oldest engineering school in the State of Alabama. It prepares students for professional careers in the engineering field. Programs of instruction are offered in the following areas: Engineering Mechanics; Computer Science and Operations Research; Chemical, Metallurgical, Civil, Electrical, Mineral, Industrial, Mechanical, and Aerospace Engineering; and Engineering Technology. The College offers the Bachelor of Science in Engineering as well as the Bachelor of Science in Engineering Technology, and offers instruction leading to the Master of Science in Engineering; Master of Science in (area of engineering); Educational Specialist in Engineering; and the Doctor of Philosophy.

F. Capstone College of Nursing

The College has as its primary purpose the preparation of a beginning, professional practitioner of nursing, as a generalist who can provide comprehensive care to persons, families, and groups through a process that incorporates both scientific and humanistic concepts. The College awards the Bachelor of Science in Nursing degree.

G. Division of Continuing Education

The Division, in conjunction with the various schools and colleges of the University, operates from the University's historic mandate to serve the entire state, providing educational opportunities for those unable to reside on campus through home-study correspondence courses, via the Alabama Educational Television Network, at regional centers throughout the state and through a variety of other non-traditional educational formats.

H. Graduate School

The Graduate School, through graduate offerings of the various schools and colleges, prepares students for careers in

teaching, research, and service. The graduate faculty offer courses leading to the following degrees: The Master of Arts, Master of Business Administration, Master of Comparative Law, Master of Fine Arts, Master of Library Service, Master of Music, Master of Public Administration, Master of Science, Master of Social Work, Educational Specialist, Doctor of Education, and Doctor of Philosophy. The Graduate School operates in cooperation with the other divisions of the University. Through its work with the graduate faculty of the various divisions, the Graduate School also has responsibility for enhancing research and other scholarly activities, which are the hallmark of a graduate institution.

I. Graduate School of Library Service

The purposes of the School are to prepare students for meaningful careers as librarians; to advance librarianship as a discipline; and to assist in the improvement of present library service. To these ends, the School offers courses of a professional nature within programs of instruction in school, college, university, public, and special libraries. The School offers instruction leading to the Master of Library Service degree.

J. New College

The New College offers students individualized curricular opportunities leading to the Bachelor of Arts or Bachelor of Science degree. Included in the program are a contract-advising process tailors to each student, general educational experiences represented by interdisciplinary, problem-solving seminars, off-campus learning for credit, and opportunities for independent study and teaching and administrative internships. The New College enables a student to plan a program of courses from any college or academic department, and offers a varied program of "non-traditional studies."

K. Office of International Studies and Programs

The Office, as an administrative unit operating cooperatively with programs within the various divisions of the

University, supports both functional and area studies instruction on the University campus. Functional Programs include the major in International Relations and the minor in International Studies within the College of Arts and Sciences; the International Business Option within the Master of Business Administration and the elective set in International Economic Relations within the College of Commerce and Business Administration. Area studies include the undergraduate Certificate in Latin American Studies and the Russian and East European Studies major and minor within the College of Arts and Sciences, and the Master of Arts in Latin American Studies within the Graduate School. The Office also coordinates study abroad opportunities, such as summer field seminars in the Amazon Basin and Mexico, the Academic Study program in Spain and France and the American Universities Field Staff (AUFS) semester program in Southeast Asia. The Office has major responsibility for the coordination of campus visits by AUFS and other international scholars.

L. School of Communication

The School offers professional courses to prepare students for careers in the print and electronic media. Within the School there are three instructional areas: broadcast and film communication, journalism, and advertising and public relations. In addition, Alabama Public Television is a component of the School. Programs of instruction lead to the Bachelor of Arts and Master of Arts degrees.

M. School of Home Economics

The School offers professional courses to students preparing for careers in home economics and related fields. Programs of instruction include majors in the following: Clothing, Textiles, and Interior Design; Foods, Nutrition, and Institution Management; Human Development and Family Life; and Consumer Science. The School offers undergraduates the Bachelor of Science in Home Economics. Instruction is offered leading to the Master of Science in Home Economics in the areas of General Home

Economics, Clothing and Textiles, Foods and Nutrition, and Human Development and Family Life.

N. School of Law

The School prepares students for professional careers in law. It offers a three-year program of graduate professional training, leading to the Juris Doctor degree. The Master of Comparative Law degree is offered for foreign students who have completed their basic legal education in their native countries.

O. School of Mines and Energy Development

The School of Mines and Energy Development is an interdisciplinary research and service division that coordinates and supports University activities in the areas of mining, mineral resources, energy and related issues. Units reporting to the School include the Mineral Resources Institute, the Natural Resources Center, and the State Mine Experiment Station. The Executive Director reports to the Vice President for Research and Public Service through a council composed of the Deans of Arts and Sciences, Commerce and Business Administration, Engineering, Law, and Community Health Sciences.

P. School of Social Work

The School prepares students for careers in social welfare and human services through the offering of professional courses in those areas. Programs of instruction are offered in the following fields: Social Welfare, Income Maintenance, Probation and Parole, and a concentration in Criminal Justice. The School offers the Bachelor of Science in Social Welfare and offers instruction leading to the Master of Social Work, Master of Science in Criminal Justice, the Master of Criminal Justice degree, and the Doctor of Social Work degree. Graduate concentrations in Clinical Practices and Direct Services, and Social Planning, Development and Administration are offered.

Q. University Libraries

The University Libraries consist of the Main Library and specialized divisional libraries within Commerce and Business Administration, Law, Education, Engineering, Community Health Sciences, and the Sciences. The Libraries, which are a United States Documents Depository, are open-stack for all students and faculty. The Libraries house special collections on Southern culture and history and contain photocopy, Interlibrary Loan, and microfilm services. The Libraries are affiliated with the Southern Library Information Network.

5. UNIVERSITY RESEARCH AND ALLIED ORGANIZATIONS

A. Alabama Consortium for the Development of Higher Education

The University of Alabama is a member of the Alabama consortium for the Development of Higher Education (ACDHE), a cooperative association among six universities and colleges in Alabama. ACDHE's mission of coordination of mutual efforts of member institutions is carried out through the ACDHE office in Tuscaloosa and through the various functional committees of the Consortium. Other members of the Consortium are Judson College, Huntingdon College, Miles College, University of Montevallo, and Stillman College. Affiliate members are the Air University, Maxwell AFB, and the Marshall Manned Spaceflight Center, Redstone Arsenal. The Institute of Higher Education Research and Services is primary liaison for the University with ACDHE.

B. Alabama Law Institute

The Alabama Law Institute was established by the Legislature as the official advisory law revision, law reform, and legal research agency of the State. Through law faculty and students, its members carry out research to revise the legal code of the State. This program is administered in conjunction with the School of Law.

C. Bureau of Educational Services and Research

The Bureau conducts school surveys for elementary and secondary schools in the State and exercises other higher education services. Its functions include assistance in designing evaluation mechanisms and other educational research and data collection and analysis to assist in programs of educational evaluation. It is administered through the College of Education.

D. Bureau of Engineering Research

The Bureau conducts research in engineering fields that benefit industry. It is administered in the College of Engineering.

E. Bureau of Public Administration

The Bureau conducts and publishes research in government and public affairs. It serves as a clearinghouse for data relating to government in Alabama, provides an in-service training program for state and local officials, and supplies pre-service training. It is administered by the Department of Political Science within the College of Arts and Sciences.

F. Center for Alcohol and Drug Education

The Center develops and coordinates alcohol and drug education training programs and courses to function effectively in regard to alcohol and drug problems within internal disciplines and professions. The Center assists groups outside the University by establishing programs, workshops, and institutes in the area of alcohol and drug use and abuse. The Center is administered within the College of Arts and Sciences in the Department of Sociology.

G. Center for Business and Economic Research

The Center is both a central reservoir of information and statistics relating to the economy of the state and an agency engaged in the use of this knowledge in research programs that promote the economic development of the state. The Center makes available for general use a substantial amount

of information on the state's economy through its two monthly publications, *Alabama Business* and *Alabama Business-Supplement.* The Center is administered in the College of Commerce and Business Administration.

H. Center for Correctional Psychology

The Center has as its major objective mobilizing the potential of psychology and the behavioral sciences to improve the quality of justice and to deal with the problems of crime, delinquency and corrections. The Center engages in training of undergraduate and graduate students, research, and training and service projects in the fulfillment of its mission. The Center is administered by the Department of Psychology.

I. The Ridgecrest Center

The Center serves as a research and teaching facility for interdisciplinary training of professionals concerned with the problems of mental retardation. The Colleges of Arts and Sciences and Education and the School of Social Work cooperate in administering the Center with Arts and Sciences acting as the administrative coordinator.

J. Center for Emotionally Disturbed Children

The Center has individually tailored residential and day-class programs for children who show behavioral and emotional difficulties. It also serves as an interdisciplinary training and research facility for students and professionals in the School of Social Work, the Department of Psychology, and the Department of Special Education.

K. Center for the Study of Aging

The Center was established to further education, training and research in the field of aging. It has fostered cooperative relationships among the School of Social Work, the Alabama Commission on Aging, and other University departments and social agencies involved in the area. The Center, which is administered within the Office of the Vice President for Research and Public Service, develops social work training programs for personnel involved in work with the aged.

L. Child Development Center

The Center is an instructional research facility that provides University students the opportunity to learn about the growth and development of young children. The program is designed to foster the social, emotional, physical, and intellectual growth of children three, four, and five years of age. The Infant Laboratory is a half-day program for children of University students. The program is planned to meet developmental needs of children from infancy to three years of age and provides opportunities for observation and study by students and faculty. The Laboratory is administered by the Department of Human Development and Family Life within the School of Home Economics.

M. University Computer Center

The Center provides computing and related services to administrative, research, instructional, and institutional users. The computing capabilities include a UNIVAC 1110 and are being extended to various agencies outside the University. Within the auspices of the Computer Center are a User Service Branch which provides expert consultants to aid individuals in the use of the computer and an Operations Branch which is responsible for running the on-site computer plus the additional remote terminals clusters around the campus. In addition, faculty and staff may obtain assistance in computer problems from students in the Computer Honors Program.

N. Comprehensive Child Services Program

The Program is funded by the University and the state and federal governments as a model for the delivery of social services to disadvantaged children and their families. It provides day care for 90 children. The Program is administered by the Department of Human Development and Family Life in the School of Home Economics.

O. Early Childhood Day Care Center

The Center fosters pre-academic skills through individual and group activities for sixteen children between the ages of

three and five years and encourages the children to explore their natural and social environment. Supported by the Psychology Department with assistance from undergraduate psychology students, the Center encourages applied and functional research on educative procedures and practices of learning, social development, and the formation of positive self-concepts.

P. Human Development Laboratory

The Laboratory offers guidance services to the children, youth, and adults of the University and surrounding community. The Laboratory is administered in the College of Education.

Q. Institute of Higher Education Research and Services

The Institute aids the development of post secondary education in the state. The Institute coordinates cooperative programs with developing colleges through provisions of Title III of the Higher Education Act and serves as a liasion for the University with the Alabama Consortium for the Development of Higher Education. It is administered by the Office of the Vice President for Research and Public Service.

R. Legal Aid Clinic

The University of Alabama opperates a Legal Aid Clinic through the Clinical Education Program of the School of Law. The Clinic gives the assistance of an experienced practicing lawyer attached to the Law School to indigents or those who meet strict income provisions. The dual function provides practical experience to law students prior to graduation, as well as alleviates some of the legal problems of citizens financially unable to pay for the services of a lawyer.

S. Human Resources Management (HRM)

HRM is an interdisciplinary research and training unit which seeks to contribute to the development, upgrading, and effective management of human resources in the state, region, and nation. In cooperation with public and private agencies it engages in research in the areas of human

resources management, industrial relations and organizational behavior and performs training, in cooperation with other interested divisions, for management, labor and governmental groups. The Institute is administered by the College of Commerce and Business Administration.

T. Marine Environmental Sciences Consortium

The University of Alabama plays a primary role in the seventeen-member Marine Environmental Sciences Consortium. The Consortium consists of four-year colleges and universities in the state. Laboratory and instructional facilities are located at the Dauphin Island Sea Lab, the Point aux Pins Lab, and the Docking and Vessel Maintenance Facilities at Bayou La Batre. The Consortium provides teaching, research, and service functions for its members and performs marine and environmental research for local, state and federal agencies in an effort to improve the quality of life in the state. One of the Consortium's primary functions is to provide field trips into the coastal waters for all schools in the state (including high schools) that are interested in learning about the marine environment. The Consortium is administratively responsible to the Office for Academic Affairs.

U. Marine Science Program

The University of Alabama and The University of Alabama in Birmingham jointly operate the Program at Bayou La Batre and Point aux Pins, Alabama. The Institute performs marine service research for local governments, the State Department of Conservation, the U.S. Corps of Engineers, and the U.S. Department of the Interior. The University is also affiliated with the Gulf Universities Research Corporation, a consortium of institutions of higher learning which performs basic and applied research on estuarine and oceanographic subjects in the Gulf of Mexico. The Institute is administered by the Office for Academic Affairs.

V. Mineral Resources Institute

The Mineral Resources Institute-State Mines Experiment Station, an interdisciplinary research and training program involving faculty from the College of Engineering and Arts and Sciences, deals with problems of the development, management, and conservation of mineral resources within the State of Alabama. The State Mines Experiment Station is a part of the Institute, which works with state agencies and the Alabama Power and Gas Companies in areas such as the development of Alabama's large coal and natural gas reserves. The Bureau of Mines works in close coordination with the Institute. The Institute is administered through the School of Mines and Energy Development.

W. Natural Resources Center

The Center is an interdisciplinary coordinating unit for research in the area of environmental concerns. Developing research activities include water resources management, air pollution, land utilization, and environmental law. The Center coordinates efforts in fields such as biology, chemistry, economics, engineering, geology, health sciences, and law. The Center is administered through the School of Mines and Energy Development.

X. Psychological Clinic

The Clinic provides psychological testing and counseling for University students, children, and non-student citizens of the state. Its facilities are used in the clinical training of graduate students as professional psychologists under a grant from the State Mental Health Board. Students in Social Work and Special Education also use the Clinic as a training facility. The Clinic is administered in the Department of Pscyhology.

Y. Speech and Hearing Clinic

The Center provides speech and hearing examinations to all ages, from preschool children to senior citizens. It seeks to correct such behavioral disorders as stuttering and poor articulation. Working with the State Crippled Children's

Service and the State Vocational Rehabilitation Service, the Center is administered in the Department of Communicative Disorders.

Z. Teaching-Learning Center

The Center has as its basic purpose the improvement of the teaching-learning process at the University. It seeks to accomplish this purpose by offering assistance to faculty members with their . . .

. . . some divisions, more detailed conditions for recruitment of department chairpersons are available. All candidates offered positions at any rank must meet the University criteria for the rank as articulated by the division and the program area.

All appointment offers are to have the positive concurrence of the dean of the division. While there is no prescribed format for tendering offers, they should include the following information: academic rank of appointment (including any contingencies, such as rank if terminal degree is not completed); salary; any additional tiles; department and division in which appointment is being made; type of appointment (tenured, probationary, temporary); graduate faculty status; effective date of appointment (when the individual is to assume responsibilities); a statement of duties; and any special arrangements relating to the appointments. In addition, all offers should be accompanied by a copy of the *Faculty Handbook* edition in force. Offers should contain a reasonable date for informing the institution of acceptance of the offer and indicating the period for which the offer is valid. If crediting of previous service at another institution toward the acquisition of tenure is involved in an appointment offer, stipulation of the maximum length the probationary period may include should be specifically noted in the letter of appointment.

2. REVIEW PROCESSES

It is recognized that a key factor in the quality of the institution is the appointment and maintenance of a highly qualified faculty. In order to recruit and retain the best faculty possible, it is essential that faculty members know the conditions of both their employment and the criteria by which their progress will be evaluated. Thus, a clearly defined set of policies and guidelines concerning the fundamental personnel considerations of appointment, professional progress review, tenure, promotion, and termination of faculty is regarded as an essential feature of the successful and harmonious operation of the institution.

For the purpose of making recommendations to the departmental chairperson on personnel matters, each division and each department within each division shall form a committee or committees to deal with specific aspects of professional progress review, tenure, and promotion of members of the faculty by procedures determined at the departmental or divisional level. An exception is that appointment recommendations do not have to be reviewed by divisional committees. At the direction of the division or department involved, one or more committees may serve to make recommendations in these four areas (with the exception that only tenured faculty members may sit on a tenure committee). In the case of small departments or interdisciplinary programs, special committees with membership beyond the program area may be formed. In view of the fact that department chairpersons are expected to render independent judgments on personnel matters, they are not to be voting members of these departmental committees. Exceptions to this arrangement can be made under unusual circumstances, but only with the approval of the dean.

3. PROMOTIONS

A. General Statement

After three years' service to The University of Alabama in a given faculty rank, a faculty member may be considered for promotion to a higher rank. Under exception circumstances,

a faculty member may be promoted in a shorter period. While, as a general rule, faculty may not be promoted in less than three years, each faculty member who has served in rank for five or more years must be considered annually to determined if the individual should be promoted unless the individual waives the right. It is the responsibility for the faculty member to prepare and submit all materials deemed relevant to the promotions committee.

The ordering of ranks at The University of Alabama, in ascending order, is: Instructor, Assistant Professor, Associate Professor, and Professor. Different criteria, including levels of attainment and experience, attach to eligibility for each rank. Criteria are cumulative. The University sets minimum criteria for each rank, and the divisions of the University supplement these criteria as they apply to the various divisions. It is the duty of the division to make available in writing all criteria for promotion to an employee at the time of initial employment. If individual departments impose criteria in addition to those of the division, these criteria should also be made available to a faculty employee at the time of initial employment.

The promotion process begins at the departmental level. Recommendations from the program area are forwarded to the division, where a separate assessment of the qualifications for promotion of prospective candidates is made. Recommendations from the divisional level are then forwarded to the Office for Academic Affairs for review and recommendation to the President of the University. The individual will be informed promptly of the recommendation at each level, and may request information regarding his or her situation.

B. Departmental Recommendations

Depending upon divisional policy, each department or group of related departments (in the case of small departments) shall establish a Promotions Committee to review the qualifications of each person under consideration for promotion. It is the duty of the committee to make recommendations on promotion of faculty, using the criteria stated by

the University as supplemented by the division and program area. The review will be made annually and will include recommendations to the chairperson on all faculty members who meet the eligibility requirements in terms of time spent in rank. Such review must be completed early enough in the year to allow adequate review at all levels. The department chairperson will make a recommendation to the dean and attach the committee's recommendation. In small departments or interdisciplinary programs where it is impractical to form an intradepartmental Promotions Committee, a special ad hoc committee may be formed at the request of the faculty member to consider the individual's record of accomplishments. Special ad hoc committees may also be formed to consider the qualifications of faculty whose primary responsibilities are to centers, bureaus, or institutes or of faculty on joint appointments. The individual faculty member in these cases, however, retains the same right of review of recommendations and appeal of those recommendations as in the case where a departmental committee has made recommendations.

C. Divisional Considerations

Each division will create a divisional promotions committee to review recommendations on promotion sent to the dean from the departments. Divisions not divided into departments will have a single divisional committee for promotions consideration. The dean will submit to this committee for its consideration all recommendations from the program area and any requests for review of an unfavorable departmental review. The divisional committee will have access to all materials used in the departmental consideration and to copies of the recommendations of the departmental committees and the chairpersons. After reviewing all materials on an individual faculty member, the divisional committee will make its recommendations to the dean. On the basis of all information and recommendations, the dean will prepare recommendations on each individual and forward these to the Office for Academic Affairs, along with all significant information that has been collected at all levels. A dean

contravening a favorable recommendation from the departmental level will inform the program area involved, and the departmental chairperson will so inform the individual affected.

D. University Considerations

Recommendations from the academic deans will be reviewed by the Vice President for Academic Affairs and officers designated by the Vice President for Academic Affairs, including the Dean of the Graduate School. On the basis of the recommendations and materials accumulated, the Vice President for Academic Affairs will make recommendations to the President. Decisions of the President will be communicated to the dean of the division, who will inform the individual faculty member, and this information will be shared with the department chairperson.

4. CRITERIA FOR APPOINTMENTS AND PROMOTIONS

The University of Alabama realizes that its accomplishments and recognition as an educational institution are largely dependent upon the contributions of capable and dedicated members of its faculty. This statement provides basic criteria utilized in the evaluations of individuals for appointment and promotions to the various academic ranks. The criteria contained herein are intended as general minimum standards for the total University. Each division will establish more specific requirements which will be applicable to the individual ranks within that division.

The following general considerations shall apply to appointments and promotions:

A. Instructor

Appointment or promotion to the rank of Instructor is based on educational achievement or related experience or both and upon the potential for advancement through the ranks. An appointee at this rank should show evidence of

becoming an effective classroom teacher and be capable of making contributions to the research and service programs of the University in areas related to the field of competence.

B. Assistant Professor

Appointment or promotion to the rank of Assistant Professor will be based on educational achievement or related professional experience or both and upon potential for advancement. The candidates should have a record of academic achievement and, in most cases, should have completed a doctoral program or other terminal academic program appropriate to the discipline. There should be substantial evidence to indicate that the individual has the capabilities and competencies required for successful performance of all professional responsibilities assigned. In addition, there should be evidence of the capacity for further professional development.

If an assistant professorship is filled on the assumption that the appointee will have completed a terminal degree program, but by the effective date of employment the appointee fails to meet this requirement, then the individual will be assigned the rank of Instructor. At the time the degree program is completed, the individual will be promoted to the rank of Assistant Professor, if recommended by the department. In such cases, the three-year limitation on promotions does not apply. The failure to complete all degree requirements within the period of time specified in the initial appointment agreement may serve as cause for non-retention of an individual employed under such conditions, at the discretion of the department.

C. Associate Professor

Appointment or promotion to the rank of Associate Professor is premised on the individual having fulfilled all the qualifications for the rank of Assistant Professor, and is justified on the basis of a record of actual performance and by indication of potential for additional achievement. There should be evidence of recent accomplishments and professional contributions in the individual's discipline. Normally,

the record of accomplishment should include evidence of outstanding achievement in at least one of the general criteria for retention, tenure and promotion at the University as supplemented by the division and department, and evidence of accomplishment in the other criteria.

D. Professor

Appointment or promotion to the rank of Professor is premised on the individual having met all the requirements for the rank of Associate Professor and is justified by the testimony of the candidate's peers who are recognized as authorities in the individual's area of specialization and by colleagues' and students' recognition of the individual's effectiveness as a teacher and scholar. Among the evidences of attainment should be recent contributions to and scholarly discipline of which the individual is a member and to the University community. An individual promoted to the rank should have a record of outstanding achievement in two of the areas of instruction, research, and service to the University and the community, a record of activity and interest in the other areas, and show evidence of continuing scholarly interest and contribution.

EXCERPTS FROM UNIVERSITY SALARY STUDY (Pl. Ex. 45)

UNIVERSITY OF ALABAMA MALE AND FEMALE 1984-85 SALARY COMPARISONS*

General research on the differences between male and female salaries in academia has been centered on (1) discrepancies in salaries and salary increases and (2) discrepancies in ranks held by men and women. At The University of Alabama, the average nine-month salary was $33,579 for men and $26,753 for women. Average faculty salaries totaled $21,909,996 in 1984-85; 19.1 percent of this figure was earned by the 23 percent of the faculty who are female.

Of 159 female faculty members in 1984-85, 35 percent were concentrated in Nursing and Home Economics, the only University of Alabama divisions with a majority of women faculty. In the divisional salary rankings shown in Table 5, it can be seen that these two divisions also had the lowest salary rankings within the University and fell −6.2 percent and −3.5 percent, respectively, below SUG averages.

Between 1979 and 1985, the annual percentage salary increase of male and female faculty members varied by 0.6 percent or less. Tables 6 and 7 show average salaries and percentage difference for men and women in the various divisions of the University for 1983-84 and 1984-85. Although males employed in disciplines, such as Home Economics and Social Work, that have a larger percentage of female than male faculty frequently are paid disproportionately more than females in the discipline, this does not appear to be the case at The University of Alabama. Within the College of Arts and Sciences, differences between 1984-85 salaries of males and females in the same rank and department varied from −11.3 percent to +1.8 percent; in the College of Commerce and Business Administration, the differences varied from −1.8 percent to +3.3 percent. For

*Only permanent, full-time faculty were included.

the faculty as a whole, the differences between male and female salaries at the professor (−11.3 percent), associate professor (−3.4 percent), assistant professor (−7.3 percent), and instructor (+4.3 percent) ranks appear to be within limits that could have been caused by the small number of women represented and by the disproportionate number of women who are in University of Alabama divisions with lower average salaries.

TABLE 6
THE UNIVERSITY OF ALABAMA
Illustration of Factors Affecting Faculty Salary Averages by Sex
1983-84

	PROFESSOR					ASSOCIATE					ASSISTANT					INSTRUCTOR				
	—Male—		—Female—		%	—Male—		—Female—		%	—Male—		—Female—		%	—Male—		—Female—		%
	N	$	N	$	Diff.	N	$	N	$	Diff.	N	$	N	$	Diff.	N	$	N	$	Diff.
Arts & Sciences																				
Humanities	30	$32,395	4	$29,167	-10.0%	32	$24,563	7	$24,349	-0.8%	23	$18,621	10	$18,966	1.9%	8	$13,866	9	$14,561	1.9%
Social & Beh. Sciences	29	$34,515	1	$32,481	-5.9%	19	$25,455	2	$24,725	-2.9%	22	$20,888	1	$21,709	3.9%	1	$19,800	1	$17,256	-12.8%
Natural Sciences & Math.	32	$35,362	—	—	—	34	$26,275	3	$25,479	-3.0%	19	$22,215	4	$21,952	-1.2%	3	$18,000	3	$17,074	-5.1%
Comm. & Bus. Admin.	33	$40,448	3	$40,785	0.8%	18	$33,458	2	$32,050	-4.2%	25	$28,160	4	$29,363	4.3%	—	—	1	$17,900	—
Communication	3	$37,267	—	—	—	8	$28,206	3	$25,308	-10.3%	8	$23,156	5	$23,115	-0.2%	2	$17,300	1	$15,286	-11.6%
Education	34	$35,028	8	$31,754	-9.3%	10	$28,191	10	$25,766	-8.6%	15	$22,404	4	$22,372	-0.1%	—	—	—	—	—
Engineering	37	$37,123	—	—	—	12	$33,003	1	$33,200	0.6%	15	$27,769	—	—	—	1	$18,500	3	$18,940	2.4%
Home Economics	2	$31,705	4	$31,268	-1.4%	2	$28,449	4	$29,371	3.2%	1	$22,531	6	$21,130	-6.2%	1	$19,165	7	$17,009	-11.2%
Law	13	$51,786	1	$51,000	-1.5%	2	$37,910	—	—	—	3	$30,500	1	$32,000	4.9%	—	—	—	—	—
Library Service	—	—	1	$31,400	—	2	$26,325	2	$25,775	-2.1%	2	$22,513	1	$21,915	-2.7%	—	—	—	—	—
New College	—	—	—	—	—	4	$30,179	—	—	—	—	—	1	$19,449	—	—	—	1	$14,646	—
Nursing	—	—	1	$26,987	—	—	—	5	$27,368	—	—	—	11	$21,313	—	1	$18,375	7	$17,432	-5.1%
Social Work	8	$36,843	2	$40,738	10.6%	7	$29,425	5	$29,120	-1.0%	1	$25,109	4	$23,648	-5.8%	—	—	—	—	—
Other[1]	—	—	—	—	—	1	$30,928	—	—	—	—	—	—	—	—	5	$14,097	2	$13,147	-6.7%
TOTAL	221	$36,863	25	$33,659	-8.7%	151	$27,891	44	$26,788	-4.0%	130	$23,351	52	$22,132	-5.2%	22	$15,721	35	$16,328	3.9%

Comparison of Average Increases for Continuing Faculty by Sex

	Male	Female
1983-84 to 1982-83	4.4%	4.7%
1982-83 to 1981-82	9.0%	8.5%
1981-82 to 1980-81	8.0%	8.3%
1980-81 to 1979-80[11]	10.0%	10.6%

[1]Includes 6 instructors in the English Language Institute, 1 foreign language instructor (Academic Affairs), and 1 associate professor from the Mineral Resources Institute.
[11]Computed using 1979-80 base salaries without the bonuses paid during the year and later made permanent; the percentages are correspondingly inflated.
Note[1] 12-m. salaries converted using .8182 conversion factor.

SOURCE[1] HEGIS reports and institutional salary survey.

OIR 06/13/86

TABLE 7
THE UNIVERSITY OF ALABAMA
Illustration of Factors Affecting Faculty Salary Averages by Sex
1984-85

	PROFESSOR					ASSOCIATE					ASSISTANT					INSTRUCTOR				
	—Male—		—Female—		%	—Male—		—Female—		%	—Male—		—Female—		%	—Male—		—Female—		%
	N	$	N	$	Diff.	N	$	N	$	Diff.	N	$	N	$	Diff.	N	$	N	$	Diff.
Arts & Sciences																				
Humanities	32	$35,845	4	$33,048	-7.8%	32	$27,554	9	$27,205	-1.3%	21	$21,571	10	$20,236	-6.2%	8	$15,301	8	$16,020	4.7%
Social & Beh. Sciences	30	$38,511	1	$35,700	-7.3%	19	$28,690	3	$28,689	.0%	23	$22,806	1	$22,000	-3.5%	1	$21,800	1	$19,326	-11.3%
Natural Sciences & Math.	33	$39,120	—	—	—	31	$29,251	2	$29,987	2.5%	23	$24,317	4	$25,971	6.8%	4	$18,600	3	$18,874	1.5%
Comm. & Bus. Admin.	34	$46,622	3	$46,428	-0.4%	20	$37,803	3	$39,054	3.3%	24	$31,709	4	$31,125	-1.8%	—	—	—	—	—
Communication	4	$44,418	—	—	—	7	$30,486	2	$26,500	-13.1%	11	$25,021	4	$23,663	-5.4%	1	$19,396	2	$15,468	-20.3%
Education	29	$37,174	9	$34,094	-8.3%	12	$31,222	10	$29,051	-7.0%	13	$24,863	4	$24,695	-0.7%	—	—	—	—	—
Engineering	39	$42,772	—	—	—	12	$37,560	1	$37,804	0.6%	15	$31,732	1	$28,500	-10.2%	—	—	1	$18,000	—
Home Economics	2	$35,032	4	$34,053	-2.8%	2	$30,834	4	$32,753	6.2%	1	$25,760	8	$23,525	-8.7%	1	$20,500	7	$19,197	-6.4%
Law	13	$58,391	1	$54,167	-7.2%	—	—	1	$39,622	—	3	$34,040	1	$36,480	7.2%	—	—	—	—	—
Library Service	—	—	—	—	—	1	$30,300	3	$28,275	-6.7%	3	$24,567	1	$24,700	0.5%	—	—	—	—	—
New College	—	—	—	—	—	4	$33,320	1	$28,607	-14.1%	—	—	—	—	—	—	—	1	$16,364	—
Nursing	—	—	1	$26,987	—	—	—	6	$28,581	—	1	$21,866	11	$22,902	4.7%	—	—	6	$19,113	—
Social Work	7	$39,005	1	$46,814	20.0%	7	$32,024	5	$31,927	-0.3%	1	$26,616	3	$26,742	0.5%	—	—	—	—	—
Other[1]	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	4	$16,561	1	$15,484	-6.4%
TOTAL	225	$41,276	24	$36,592	-11.3%	147	$31,142	50	$30,087	-3.4%	139	$26,060	52	$24,158	-7.3%	19	$17,090	30	$17,825	4.3%

Comparison of Average Increases for Continuing Faculty by Sex

	Male	Female
1984-85 to 1983-84	12.4%	12.0%
1983-84 to 1982-83	4.4%	4.7%
1982-83 to 1981-82	9.0%	8.5%
1981-82 to 1980-81	8.0%	8.3%
1980-81 to 1979-80[11]	10.0%	10.6%

[1]Includes 4 instructors in the English Language Institute and 1 foreign language instructor (Academic Affairs).
[11]Computed using 1979-80 base salaries without the bonuses paid during the year and later made permanent; the percentages are correspondingly inflated.
Note: 12-m. salaries converted using .8182 conversion factor.

SOURCE: HEGIS reports and institutional salary survey.

OIR 06/13/86

The overall differences between the average 9-month salaries of men and women in 1983-84 and 1984-85 appear to have been related partly to the academic ranks that women held as compared to those men held. In the academic year 1984-85, 15 percent of the female faculty were full professors and 19 percent were instructors, whereas 42 percent of the male faculty were full professors and 4 percent were instructors. At the associate level, 32 percent were women and 26 percent were men. At the assistant level, 33 percent were women and 26 percent were men. Although the rank problem is related to the functional role which historically has been assigned to women, the University must be aware of the relatively normal distribution of women in academic ranks and the extremely skewed distribution of men.

In summary, the differences in the rank distribution and in the relative concentrations in lower and higher paid divisions between men and women at The University of Alabama appears in average salaries, the statistics most frequently computed by organizations. In the future, it seems important that the utmost care should be taken to assure that women are promoted as soon as their records of achievement warrant promotion. In addition, because over 1/3 of the female faculty members are concentrated in the two University of Alabama divisions with the lowest salary rankings (Nursing and Home Economics) and because this relative position is not as strongly depicted in salary comparisons with other SUG institutions, it seems important that the salary ranking of the various divisions of the University (See Table 5) be re-evaluated to assure consistency with University strengths and priorities.

A. I don't know.

THE COURT: Susan, is that microphone switched on?

MS. REEVES: I just might not be speaking up. I'm sorry.

THE COURT: I think it's just not pointed at you. It's highly directional.

BY MS. REEVES:

Q. Dr. Thomas, when you came to the University in 1981, were you aware that the — there was a handbook requirement regarding the standards for promotion to full professor?

A. Yes, I was.

Q. What, Dr. Thomas, are your responsibilities with respect to faculty personnel, and particularly with respect to promotional practices?

A. I have final decision with regard to personnel policies and, in fact, all the policies at the University.

Q. Okay. I'm going to direct my questions to personnel policies. Do you consider that to be an important function of the duties of the office of president?

A. It certainly is a significant function, yes.

Q. Would you consider it to be one of the most significant functions which a president has at the University; that is to say, that function being to direct the personnel and — to formulate and direct the personnel policies with respect to faculty?

A. No, I would not say that that was the most important.

Q. Is it one of the most important?

A. No, I wouldn't say so.

Q. Do you in fact make decisions with respect to promotions for people, for faculty to the ranks — of the ranks from assistant to associate to full professor?

A. Yes, I do.

Q. You are not a rubber stamp, is that correct?

A. That is correct.

Q. Has that been the case since you have been at the University since 1981?

A. It has been my approach to that particular responsibility, yes.

Q. Would it be fair to conclude from that that you take these decisions seriously?

A. Yes.

Q. Do you, as an academician, take into account the opinion of experts in the field regarding promotions when you make those decisions on promotion?

A. When I make my decisions on promotions, I'm dealing primarily with evidence that's presented to me by the academic vice-president. The detailed study of the dossier, the performance of the individual is studied in detail by the departmental committee, by a larger school or college committee and by the entire staff in the office of Academic Affairs.

My responsibility is — as I interpret this, is the final decision-making responsibility. And I deal only with the academic vice-president in that regard.

THE CLERK: Plaintiff's Exhibit 15 marked.

MR. MURPHY: That's on your exhibit list?

MS. REEVES: Yes.

BY MS. REEVES:

Q. Dr. Thomas, let me show you what I have marked for identification as Plaintiff's Exhibit 15. Do you recall this document?

A. Yes, I recall this document.

Q. Was that — does that document —

MS. REEVES: At this time, I would offer Plaintiff's Exhibit 15.

THE COURT: Is there any objection?

MR. MURPHY: No objection.

THE COURT: It will be admitted.

BY MS. REEVES:

Q. Dr. Thomas, do you — is it true that this was the document — this is the documentation and the information that you had in front of you when you made the decision regarding Kathleen Wu's promotional application in 1984?

A. Dr. Sayers brings with him the full dossier of each of the applicants when we have our discussions. But this is the principal document that we discuss.

Q. Well, when I asked you to produce the documents that you reviewed when you considered your action on the decision of Kathleen Wu's promotion, her application in 1983 and your action in 1984, is it true that that is the document that you produced?

A. That is correct.

Q. Okay.

A. I did not look at her dossier.

Q. Okay. Dr. Thomas, in the process of making the decision that you made in 1984 in denying Dr. Wu's application promotion, were you aware that her department, an interdepartmental committee composed of philosophers, with philosophers on it, had recommended her for promotion?

A. Yes, I was aware of that.

Q. To your knowledge, was there any person who had any expertise in the field of philosophy — now, I'm addressing my question limited in time to your '84 decision, just so you'll understand the time limits.

Was there any person on the college committee of Arts and Sciences that year, to your knowledge, who had any expertise whatsoever in the field of philosophy?

A. The field of philosophy is a very broad area. I would assume that each member of the committee had some expertise in philosophy, yes.

Q. Why would you assume that?

A. Because it's such a broad area and we're dealing with well-educated, well-read people. Some areas of philosopy get very close to mathematics in the areas of logic. And there was a mathematician, I believe, on the committee.

There were some people in the English Department, very well-read people. I would assume they had considerable expertise in the broad area of philosophy.

Q. Did you in fact give the same weight to their judgment as experts in the field of philosophy as you would give to people who have studied and worked in the area of philosophy both inside the University, who recommended Dr. Wu, and outside the University, who supported Dr. Wu's candidacy?

A. When I reviewed the materials, the following facts were evident to me. One, there was a unanimous vote against the recommendation by the entire college committee, a fairly large committee, about twice the size of the departmental committee.

Q. How large was the departmental committee?

A. I think three or four.

Q. Okay.

A. Two, the departmental committee is composed of only two members of the . . .

BY MS. REEVES:

Q. Did you change the standards for promotion to the rank of professor?

A. The day I arrived on this campus, the day I was appointed by the Board of Trustees, I made a public statement.

Q. My question is directed to the 1985 faculty handbook, Dr. Thomas.

A. Did we change the standards in the faculty handbook of '85?

Q. Yes.

A. Yes, we did.

Q. For promotion to the rank of professor?

A. That's correct.

Q. You did change those standards?

A. Yes.

Q. Okay. Was that change in standards a written result of your previous intention to change those standards?

A. I don't think so. The faculty handbook represents, not a document that I put together, but a document that was put together by the broad University community. The faculty senate had a great deal of input into that. Each of the deans participated actively in the development of that document.

There were literally scores of members of the University community who contributed to that. And it's not something that I drafted and it doesn't really represent a summation of standards that I sought to have implemented at the University. It does reflect an increase, a raising of the standards, yes.

Q. With respect to your last — the 1985 faculty handbook reflects an increasing of those standards —

A. Raising of the standards.

Q. — for promotion to the rank of professor?

A. That's correct.

Q. It may be other things, Dr. Thomas, but we're really not concerned with them here in this trial. I'm just focusing on that.

A. Okay.

PLAINTIFF'S COUNSEL and DEFENSE COUNSEL OPENING REMARKS REGARDING the DEFENDANTS' PROMOTIONAL PRACTICES AFFECTING FEMALE FACULTY

. . . skin condition, that she had, like Dr. Wu, applied for promotion more than once, that she was asked to submit additional material, that her promotional application was not approved, that there were discriminatory statements made to her by her department chairman regarding salary, and that on the second promotional application her file did not change, but that she was approved.

She has told me in the interviews that she did not thnk that she was treated fairly as a woman. She has also told me in interviews that she did not want to fight for Kathlen Wu; that, if she had wanted to fight, she would have fought in her own case, but she choose not to fight the University and she did not desire to be involved.

I understand that and I appreciate that, but I thought that her testimony was important for the reason that the University maintains that there's no difficulty in women being promoted to the rank of full professor, which is what this case is about, primarily.

MR. MURPHY: That's a mischaracterization. It is enormously difficult to become a full professor.

MS. REEVES: I hope I said that there's no difficulty in women being promoted to the rank of full professor. And the point of her testimony is to prove that, of the few women who were promoted in the School of Arts and Sciences — and that is where we're focusing our attention, not throughout this whole college and University, but only in the School of — College of Arts and Sciences — that, indeed, for the women who were promoted, that they were promoted with great difficulty, even though their names do appear on a list.

THE COURT: Well, I don't want to continue the case because of one witness being in the hospital when she's not really a critical witness. You have others.

which, just like this case, a summary judgment was filed and there was a question of whether or not there was a continuing failure to promote —

THE COURT: Did you bring me a copy of that?

MS. REEVES: Did I bring you a copy?

THE COURT: I don't have that.

MS. REEVES: I will provide a copy of the case today.

There, the university — the Court here held that the university's decision not to promote the claimant was not appropriate for summary judgment because he was going to allow the plaintiff to put on evidence that there was a pattern of the defendant's conduct of denying promotions to women as a part of its pattern, or a policy of denying promotions to women on the same basis as they were granted to men. . . .

That's one of the things that we expect to prove here, although we're — . . .

The college committee, in the exercise of its best judgment, felt that her academic performance did not warrant promotion to full professor.

The University of Alabama in the College of Arts and Sciences had enjoyed, the last several years and particularly in the time of Dr. Wu's applications, a remarkable record in the promotion of women faculty members throughout all ranks of the college and the University, and that record continues.

There will be no credible evidence that a pattern and practice of discrimination against women in promotion of the College of Arts and Sciences was underway at this time. In fact, of all the applicants for promotion, all the women applicants for promotion in the College of Arts and Sciences, in the three years of Dr. Wu's applications, everyone other than her was promoted with one excpetion of a woman the following year, the year that Dr. Wu did . . .

PLAINTIFF'S EXHIBIT 41

SUMMARY OF FACULTY AT FULL PROFESSOR RANKS IN COLLEGE OF ARTS AND SCIENCES

	MALE	FEMALE
Total Number of Professors	124 *	6 **
Average Number of Years Before Becoming Full Professor	8.5	14.6
Percentage of Total Faculty who are Full Professors	29.8	1.4

* Joseph O. Vogel, Christopher Kakas were not counted because Exhibit 41 shows each was promoted 3 years and 8 years respectively prior to date of hire.

** Mary Porter was not counted because Exhibit 41 shows that she was promoted 8 years before she was hired.

Of the six women who are full professors, three of them, Claudia Johnson, Amanda Penick and Virginia Foscue were promoted after Kathleen Wu in 1981 complained about sex discrimination and after Rose Gladney filed suit against UA alleging sex discrimination.

Supreme Court, U.S.
FILED
MAR 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1315 (2)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

KATHLEEN JOHNSON WU,
Petitioner,
v.
THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA, a body corporate, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF OF RESPONDENTS BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA, JOAB THOMAS, AND DOUGLAS JONES IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

STANLEY JAY MURPHY *
PAUL E. SKIDMORE
OFFICE OF COUNSEL OF
THE UNIVERSITY OF
ALABAMA SYSTEM
P.O. Box 870106
Tuscaloosa, AL 35487-0106
(205) 348-5490
Attorneys for Respondents

* Counsel of Record

March 1989

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

13 pp

PARTIES TO THE PROCEEDINGS BELOW

Plaintiff	*Defendants*
Kathleen Johnson Wu	Board of Trustees of the University of Alabama, a body corporate
	Joab Thomas
	Douglas Jones

TABLE OF CONTENTS

	Page
PARTIES TO THE PROCEEDINGS BELOW	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	3
I. Adverse Impact Claim	3
A. What Is The Challenged Policy?	5
II. Is a Prospective Promotion in Academic Rank an Interest Protected by the Fourteenth Amendment?	8
CONCLUSION	9

TABLE OF AUTHORITIES

Cases Page

Bigby v. City of Chicago, 766 F.2d 1053 (CA7 1985), *cert. denied*, 106 S.Ct. 793 (1986) 8
Bishop v. Wood, 426 U.S. 341 (1976) 7
Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) 8
Clark v. Whiting, 607 F.2d 634 (CA4 1979) 7, 8
Griffin v. Carlin, 755 F.2d 1516 (CA11 1985) 8
Griggs v. Duke Power Company, 401 U.S. 424 (1971) 6
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 4
Watson v. Fort Worth Bank and Trust, —— U.S. ——, 108 S.Ct. 2777 (1988) 5, 6, 7, 8
Webster v. Redmond, 599 F.2d 793 (CA7 1979), *cert. denied*, 444 U.S. 1039 (1980) 8
Zahorik v. Cornell University, 729 F.2d 85 (CA2 1984) 6

Constitution and Statutes

U.S. Const. amend. XIV 2, 8
42 U.S.C. 1983 ..... 2, 8
42 U.S.C. 2000(e) 2, 5, 6
[Title VII of the Civil Rights Act of 1964]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1315

KATHLEEN JOHNSON WU,
Petitioner,

v.

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA, a body corporate, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF OF RESPONDENTS BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA, JOAB THOMAS, AND DOUGLAS JONES IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported as *Wu v. Thomas*, 847 F.2d 1480 (CA11 1988).

JURISDICTION

The respondents agree that this Court has jurisdiction to consider the petition for a writ of certiorari.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved are the fourteenth amendment to the Constitution of the United States; and the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e and 42 U.S.C. 1983. They are set forth at pages one and two of the appendix filed with the brief of petitioner.

STATEMENT OF THE CASE

The judgment of the district court and its affirmance by the court of appeals are supported by comprehensive findings of fact contained in the district court's Memorandum Opinion.

The petition for certiorari challenges only the legal conclusions of the courts below. There is no contention in the petition that any finding of fact was in error. However, the petitioner's "Statement of the Case" to this Court is grossly inadequate in its presentation of the facts upon which the courts below based their legal conclusions. The respondents respectfully suggest that the following facts may be taken as finally determined:

1. Kathleen Wu was not qualified to be promoted to full professor. (A-9; A-57)[1]
2. No equally or less qualified male was promoted to full professor during the relevant time frame. (A-9; A-57)
3. The standards of academic performance required for promotion to full professor were applied equally to men and women applicants. (A-38-49, 57)
4. During each of the three years that Dr. Wu applied for full professor, women applicants for academic promotion in the College of Arts and

[1] Citations to the decisions of the court of appeals and the district court are to the appendix filed with the petition.

Sciences enjoyed a much higher rate of success than did men. (A-37)

5. The enhanced importance of research scholarship and academic productivity in faculty promotion decisions was well-known to and embraced by the faculty community, and is consistent with similar national trends. (A-28)

The district court went well beyond all requirements of Rule 52 of the Federal Rules of Civil Procedure for specifying the factual bases of its decision. Dr. Wu's attempts to compare her qualifications with other faculty at The University of Alabama were carefully examined by the court. The district court's findings of fact on the qualifications of Dr. Wu and each comparator, the manifest inadequacy of Dr. Wu's academic productivity, the motives of each participant in the promotion process, and all other significant issues raised at trial are articulated in detail in the Memorandum Opinion. Each finding of fact was affirmed by the court of appeals. The petition to this Court does not contend that the district court's findings of fact were erroneous.

REASONS FOR DENYING THE WRIT

Dr. Kathleen Wu seeks the review by this Court of two aspects of the case below. She contends that neither the district court nor the court of appeals adequately addressed her claim under the adverse impact theory of employment discrimination. She further contends that both courts below erred in holding that a prospective promotion in academic rank was not an interest protected by the fourteenth amendment. For the following reasons this Court should deny the writ.

I. Adverse Impact Claim

Dr. Wu contends that the courts below erred in not considering her adverse impact theory of employment discrimination. The record is clear that she neither pled

nor proved an adverse impact claim. Her proof was directed to a claim of intentional sex discrimination in the denial of her promotion to full professor. The district court found, and the court of appeals affirmed, that Dr. Wu did not make a *prima facie* case under the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) formula of proof. She was not qualified for a promotion to full professor and no equally or less qualified male was promoted to full professor during the relevant time frame. Having failed to make a *prima facie* case, Dr. Wu's claim would ordinarily be at an end. The district court elected to continue its analysis, however, as if a *prima facie* case had been established.

The district court examined at length and in detail the faculty promotion system at The University of Alabama as it applied to Dr. Wu and to numerous other faculty, male and female. It found that the reasons given for the denial of Dr. Wu's promotion were legitimate, nondiscriminatory, and true. The court found that the standards applied to Dr. Wu were the same standards applied to every other applicant for promotion to full professor in the College of Arts and Sciences during the period of time of Dr. Wu's three applications. During the period of Dr. Wu's failed promotion attempts, every other woman applicant for promotion within the College of Arts and Sciences was promoted. One woman's application was deferred for one year, but she was promoted in her second application. By contrast, the applications of many male faculty members were denied. The academic achievements of those men who were promoted in the College of Arts and Sciences were subject to individual and detailed review by the district court. In each case the court found that the successful promotees were manifestly more qualified than Dr. Wu.

Having lost on her disparate treatment claim, Dr. Wu now contends, as an appellate afterthought, that she also was making an adverse impact claim. The University

does not argue, and the courts below did not find, that a Title VII plaintiff is limited either to the disparate treatment or to the disparate impact theory of recovery. The law is clear that a claim can be made under either one or both theories. In this case only a disparate treatment claim was presented. If Dr. Wu had in fact sought recovery under a disparate impact theory, however, the results would have been the same.

As this Court recently held in *Watson v. Fort Worth Bank and Trust*, —— U.S. ——, 108 S.Ct. 2777 (1988), a plaintiff proceeding under the adverse impact theory must meet two initial burdens:

> The plaintiff must begin by identifying the specific employment practice that is challenged.
>
> . . . .
>
> Once the employment practice at issue has been identified, causation must be proved; that is, the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group.

Watson at 2788, 2789

If a plaintiff successfully meets these two requirements, the employer must show that the challenged policy meets the "business necessity" or "job relatedness", test. When faced with such a showing of job relatedness, the burden remains on the plaintiff to show a substitute policy or practice which would not have a discriminatory impact and which would accomplish the same legitimate goals of the employer. Dr. Wu's case utterly fails to meet any of the adverse impact requirements.

A. What Is the Challenged Policy?

Dr. Wu contends that the University's enhanced emphasis on research scholarship has an adverse impact on women faculty. Without the slightest basis in the rec-

ord or in the reality of higher education, Dr. Wu likens judgments on academic scholarship to the high school diploma requirements addressed in *Griggs v. Duke Power Company*, 401 U.S. 424 (1971). In her petition she contends:

> An unjustified requirement of more publications for promotion is unlawful where the requirement keeps women in lower academic ranks.
>
> Increased publication of scholarly articles by faculty may be a facially neutral requirement but raising publication requirements, especially for the top rank into which few women had risen, is a barrier invidiously operating to discriminate on the basis of sex.
>
> (Petition, page 10)

The experience of women faculty at The University of Alabama gives the lie to such a bizarre notion. The dormancy of Dr. Wu's research scholarship, carefully and accurately described by the district court at A-31 through A-32, was neither the product nor a symptom of a gender-based trait.

Even if academic quality requirements had an adverse impact on women applicants, those requirements would be permitted if they were adequately job related. Every court considering this issue has held that requirements for academic scholarship are quintessentially "job related". In *Watson v. Fort Worth Bank and Trust* this Court once again confirmed this principle and cited with approval *Zahorik v. Cornell University*, 729 F.2d 85 (CA2 1984) which held:

> [The] criteria [used by a university to award tenure], however difficult to apply and however much disagreement they generate in particular cases, are job related. . . . It would be a most radical interpretation of Title VII for a court to enjoin use of an historically settled process and plainly relevant criteria largely because they lead to decisions which are difficult for a court to review. *Zahorik* at 96.

Watson v. Fort Worth Bank and Trust, 108 S.Ct. 2777, at 2791.

Relying upon *Bishop v. Wood*, 426 U.S. 341 (1976) the fourth circuit held that:

> Denial of a faculty promotion based on an evaluation of the faculty member's "scholarly achievements" is exactly the type of determination which, under *Wood*, is not justiciable in federal court in an action under § 1983. And that has long been the ruling uniformly applied by the courts, and now affirmed in *Wood*, for which there is an abundance of supporting reasons.

Clark v. Whiting, 607 F.2d 634, at 639 (CA4 1979). The decisions of the district court and the court of appeals are perfectly consistent with this uniformly recognized principle of law and fact of academic life.

Even if she challenged an employment policy which did not pass the "job relatedness" test, Dr. Wu would have been required to show a causal relationship between that policy and the composition of the work force. Dr. Wu's attempt at meeting the causality test represents a classic misunderstanding of the law of adverse impact. She introduced no "applicant flow" data, no evidence of any disparity in the application success of men and women, no evidence of the "available labor pool" of minimally qualified applicants for promotion to different academic ranks in the various academic disciplines, and no evidence that the heightened scrutiny of scholarly output in any way adversely affected women applicants. The University's uncontradicted applicant flow evidence proves that women applicants have been successful at a far greater rate than their male counterparts under the enhanced standards.

In a last effort to articulate an adverse impact cause of action, Dr. Wu misreads this Court's recent holding in *Watson*. The University never contended, and neither

the district court nor the court of appeals ever ruled, that the statistical results of employment decisions based upon subjective factors could not support an adverse impact determination if properly pled and proved. The principle articulated in *Watson* has been the rule in the eleventh circuit for some time. *See, Griffin v. Carlin,* 755 F.2d 1516, 1522-1525 (CA11 1985).

II. Is a Prospective Promotion in Academic Rank an Interest Protected by the Fourteenth Amendment?

Dr. Wu also contends that the courts below erred by holding that a prospective promotion in academic rank is not an interest protected by the fourteenth amendment. Dr. Wu attempted to assert a fourteenth amendment claim under 42 U.S.C. 1983. As a matter of law, the rulings below are governed by and consistent with this Court's decision in *The Board of Regents of State Colleges v. Roth,* 408 U.S. 564 (1972). This result is in accord with similar decisions in other circuits. *See, Clark v. Whiting,* 607 F.2d 634 (CA4 1979); *Bigby v. City of Chicago,* 766 F.2d 1053 (CA7 1985), *cert. denied,* 106 S.Ct. 793 (1986); *Webster v. Redmond,* 599 F.2d 793 (CA7 1979), *cert. denied,* 444 U.S. 1039 (1980). In Dr. Wu's case, the denial of her promotion applications in no way impaired her job security as a tenured faculty member, stigmatized her, or deprived her of any right to which she had a vested claim or entitlement.

Even if a promotion in academic rank were a protected interest under the fourteenth amendment, the facts as established by the district court would be an absolute bar to Dr. Wu's recovery under 42 U.S.C. 1983. The district court meticulously examined the motives of University officials involved in these promotion decisions. The district court found that there was no impermissible motive. Hence recovery under 42 U.S.C. 1983, which requires a finding of invidious intent, would be improper.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be denied.

Respectfully submitted,

STANLEY JAY MURPHY *
PAUL E. SKIDMORE
OFFICE OF COUNSEL OF
THE UNIVERSITY OF
ALABAMA SYSTEM
P.O. Box 870106
Tuscaloosa, AL 35487-0106
(205) 348-5490
Attorneys for Respondents

* Counsel of Record

March 1989